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Supreme Court of the United States

OCTOBER TERM, 1956

No. 787

J. R. HOLMAN, JACK M. JAMES, LAVONNA JAMES, ANDREW J. THICKSTUN, and ALTA MAE THICKSTUN,
Petitioners,

vs.

LILLIE BUTLER and ERNEST W. BUTLER, Executrix and Executor, respectively, of the Last Will and Testament of AARON BURR BUTLER, deceased, G. M. RUSSELL, R. W. RUSSELL, and E. F. CHAMBERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH DISTRICT.

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NO.

J. R. HOLMAN, JACK M. JAMES, LAVONNA JAMES, ANDREW J. THICKSTUN, and ALTA MAE THICKSTUN,
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LILLIE BUTLER and ERNEST W. BUTLER, Executrix and Executor, respectively, of the Last Will and Testament of AARON BURR BUTLER, deceased, G. M. RUSSELL, R. W. RUSSELL, and E. F. CHAMBERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH DISTRICT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

J. R. Holman, Jack M. James, Lavonna James, Andrew J. Thickstun, and Alta Mae Thickstun respectfully petition for a writ of certiorari to the District Court of Appeal of the State of California for the Fourth District to review a judgment of said Court filed on November 15, 1956, and entered on December 15, 1956, affirming the judgment

of the Superior Court of the State of California in and for Fresno County, Honorable George M. DeWolf, Judge, in favor of respondents, awarding them damages of $161,588.23.

The opinion of the said District Court of Appeal (303 P. 2d 573), is reproduced as an appendix to this petition.

Petitioners filed a "Petition for Rehearing" in the said District Court of Appeal in connection with its said judgment on November 30, 1956, which petition was denied on December 10, 1956. On December 26, 1956, petitioners filed in the Supreme Court of the State of California a petition for a hearing in this cause in that Court; the said petition was denied on January 8, 1957.

Upon application of petitioners, the said District Court of Appeal stayed the remittitur in this cause until February 15, 1957, but denied their application for a further stay of remittitur of twenty-eight days, or until March 15, 1957, the final date for filing of this petition for a writ of certiorari under the terms of Section 2101 of the United States Judicial Code.

Petitioners having exhausted their remedies in this regard in the Courts of the State of California, applied to this Court on February 8, 1957, for the additional stay of remittitur noted, which application was denied on February 13, 1957.

This petition for a writ of certiorari is being filed well within the time allowed for the filing thereof.

Jurisdiction of this Court.

The sanctity and inviolability of official United States Government surveys covering patented lands has long been upheld by this Court, and its opinions in this regard have

been scrupulously and universally followed by other Courts throughout the land. The prevailing law thus established is that once a patent has been granted pursuant to such an official survey the boundaries may not be collaterally attacked in an action between private parties, and, further, that such a Government survey and the boundaries established thereby, be they correct or incorrect, are inviolable and may not be changed or altered even by Court decree. And yet, petitioners contend, that is exactly what was done by the trial Court in the case at bar and condoned and affirmed by the District Court of Appeal. Petitioners contend that where the boundaries established by an official Government survey are being violated, as in the case at bar, a Federal question of substance is presented, giving this Court jurisdiction to review the matter on a writ of certiorari. The Government has a continuing interest in maintaining the inviolability of its official surveys and the boundares established thereby, and also has an interest in preserving its right and title to adjoining land constituting part of the public domain (as in the case at bar).

Rule 19 Gives Court Jurisdiction.

Review on a writ of certiorari in this cause is sought pursuant to the terms of Rule 19 of the Rules of this Court, entitled "*Considerations Governing Review on Certiorari*", specifically the following indicating the character of reasons considered by this Court in passing upon a petition for such a writ:

> "(a) Where a state court has decided a federal question of substance . . . . in a way probably not in accord with applicable decisions of this court.
>
> "(b) Where a court of appeals . . . . has decided a federal question in a way in conflict with applicable decisions of this court;"

STATEMENT OF FACTS.

Respondents brought an action against petitioners and several others designated by fictitious names, by filing their verified Complaint (Clks. Tr. 1) for damages for trespass in entering in and upon the alleged premises of plaintiffs and removing alleged valuable chromium deposits and for a perpetual injunction to restrain further mining. The properties were described as being the South half of the Southeast quarter (S½ SE¼) and the South half of the Southwest quarter (S½ SW¼) of Section 34, Township 18 South, Range 13 East, M.D.B.M., within the County of Fresno, State of California.

Issue was joined by the filing of a verified answer and cross-complaint (Clks. Tr. 10 and 12), setting up denial of any trespass or entry upon the lands of respondents and alleging occupancy of a mining location in the Northwest quarter (NW¼) of Section 2, Township 19 South, Range 13 East, M.D.B.M., in said County of Fresno, which would be to the south of and adjoining the premises of respondents.

Coincidentally with the filing of the answer and cross-complaint, petitioners obtained an order to show cause and restraining order directed to the respondents to prohibit interference with the mining operations, which said order was granted by the Court July 8, 1955. (Clks. Tr. 19 and 27.) Answers to the cross-complaint were filed in due time, placing the cause at issue.

After two hearings the motion for preliminary injunction made by plaintiffs was denied and the petition of the defendants for preliminary injunction was granted. (Clks.

Tr. 59.) The reporter's transcripts covering these two hearings were subsequently received in evidence in this cause by stipulation as Joint Exhibits "6A" and "6B".

A first amended answer (Clks. Tr. 106) and a second amended answer (Clks. Tr. 111) were filed by petitioners and also a supplemental cross-complaint (Clks. Tr. 84), which was answered by respondents (Clks. Tr. 117). Petitioners filed motion to join the United States of America as an indispensable party defendant (Clks. Tr. 68); motion was denied (Clks. Tr. 78). Petitioners filed motion for continuance on September 12, 1955, to permit re-survey of line in question by Bureau of Land Management, United States Department of the Interior, citing negotiations already concluded with Bureau, except for exact date for performance of work, and deposit of $1,000.00 to cover cost. (Clks. Tr. 87.) Motion for continuance was denied on September 16, 1955 (Clks. Tr. 101).

Upon the pleadings thus settled, the parties proceeded to trial. By its letter (Clks. Tr. 236), the trial Court advised the parties of its decision; and upon this opinion, findings of fact and conclusions of law (Clks. Tr. 260) were filed, and judgment in favor of respondents and against petitioners, in the sum of $161,558.23 and costs was entered. (Clks. Tr. 270.)

Petitioners twice moved to set aside the submission and re-open this case, once after submission but prior to decision (Clks. Tr. 152), and once after decision but prior to judgment. (Clks. Tr. 241.) Both motions were denied. (Clks. Tr. 235 and 249.) Motion for new trial was interposed (Clks. Tr. 253) and denied by the Court. (Clks. Tr. 329.) Notice of appeal (Clks. Tr. 330) was timely filed together with request for transcript. (Clks. Tr. 331.)

The District Court of Appeal of the State of California for the Fourth District in an opinion filed on November 15, 1956 (See appendix), affirmed the judgment of the trial Court.

Petitioners thereupon filed a petition for a hearing in the Supreme Court of California, which was denied on January 8, 1957.

Having thus exhausted their remedies in the lower Courts, petitioners now seek a review by this Court on a writ of certiorari of the decision of the said District Court of Appeal of the State of California.

The record shows that in November, 1951, petitioners James and Thickstun went upon surveyed public land of the United States in the Northwest quarter (NW¼) of Section 2, Township 19 South, Range 13 East, M.D.B.M., and located the James-Thickstun No. 1 Placer Mining Claim. (Jt. Exh. No. 6-A, p. 18; Rep. Tr. pp. 14, 107, 108, 271-B.) James and Thickstun proceeded to work the claim with bulldozers and to prospect for a lode. (Jt. Exh. No. 6-A, p. 19.) They extracted and shipped some high grade ore. (Rep. Tr. pp. 175, 176.) Their operations were admittedly open and notorious.

In May, 1953, petitioner James filed the Mistake lode mining claim upon the same ground. (Rep. Tr. p. 110.) Prior to that date, arrangements had been made with appellant Holman for him to operate the mine. (Rep. Tr. pp. 159, 160.) Holman's operation, again open and notorious, had begun in November or December, 1952, and by January, 1953, he was producing chromite. (Rep. Tr. p. 160.) The mining operation was carried on through the use of bulldozers, heavy equipment, and blasting. (Jt. Exh. No. 6-A, pp. 16, 17; Rep. Tr. pp. 496, 497.) Much

road work was necessary and was performed to permit ingress to the mine and egress from it. (Rep. Tr. p. 497.)

Respondents Lillie Butler and Ernest W. Butler, executrix and executor, own patented land comprising the South half of the South half ($S\frac{1}{2}S\frac{1}{2}$) of Section 34, Township 18 South, Range 13 East, M.D.B.M., to the north. It is appraised in the inventory of the estate of Aaron Burr Butler at $4.00 per acre. (Plaintiffs' Exh. No. 24; Rep. Tr. p. 284.) It had been leased by plaintiffs to their brother and fellow-heir, Guy Butler, for pasture and grain. (Rep. Tr. p. 281.) Guy Butler had run cattle on the land for seventeen years prior to the trial of this matter. (Rep. Tr. p. 287.)

Petitioner Holman's chrome mining operation was publicized in newspapers and trade journals. (Rep. Tr. p. 498, *et seq.*) Respondent Ernest W. Butler testified that he first learned about the mining operation in August, 1954. (Rep. Tr. p. 282.) He did nothing; no effort was made to contact any of petitioners until April 12, 1955. (Rep. Tr. pp. 278, 283, 503.) Petitioner Holman's overhead costs were $45,000.00 per month. (Rep. Tr. p. 504.)

In June, 1955, respondents filed their complaint, claiming petitioners' mine on the ground that it occupies a part of their land. (Clks. Tr. 1.) *The issue presented was the extent of plaintiffs' ownership. This, in turn, depended upon the location of the southwest corner of Section* 34. *The corner was placed on the ground by United States Deputy Surveyor Benson in* 1879. (Plaintiffs' Exh. No. 2 and No. 4.)

Both sides employed surveyors. Respondents employed J. A. Ross, Ross' employee, William O. Gentry, helped him. Petitioners employed Walter S. Hardgrove, and later,

Dupree A. Averill, to help him. At the preliminary hearing, none of the surveyors had found the corner. (Jt. Exh. Nos. 6-A and 6-B.) Ross found a corner one mile to the east, and he found another corner one mile to the west. (Rep. Tr. p. 28.) He simply ran a straight line between the two. (Rep. Tr. pp. 54, 55.) It had no relation to the calls of the original field notes. (Jt. Exh. No. 6-A, p. 146; Rep. Tr. pp. 61, 80, 81.) Hardgrove followed the calls to topography contained in the original field notes. (Jt. Exh. No. 6-A, p. 48, *et seq.*) Ross' line ran through the mine. (Cross-defendants' Exh. E on preliminary hearing, overlay prepared by Wm. O. Gentry.) Hardgrove's line ran north of it.

At the trial, Ross stood upon his straight line. (Rep. Tr. pp. 55, 58, 64.) Plaintiffs rested. (Rep Tr. p. 271B.) Hardgrove testified on behalf of petitioners that he had found the forked pine tree twenty-four inches in diameter set out in the original field notes of the United States deputy surveyor as being southwest of the corner. (Rep. Tr. p. 319.) It was properly scribed. (Rep. Tr. pp. 336, 337, 470.) Physical evidence of the tree was introduced. (Defendants' Exh. J.)

A straight line projected from the southeast corner of Section 34, *the location of which is not in controversy, to the southwest corner of Section* 34, *using the position of the southwest corner of Section* 34 *in accordance with the original field notes, ran north of the mine.* (Rep. Tr. pp. 347, 348.)

Over objection of petitioners' counsel, trial was recessed so that Ross could make some more surveys. (Rep. Tr. p. 447, *et seq.*) *Ross then admitted that his line was wrong.* (Rep. Tr. p. 520.) *He also admitted that the forked pine tree was the tree described in the original field notes as*

being southwest of the corner. This was "without question." (Rep. Tr. p. 537.)

Ross contended that *if the original field notes were reversed, however, and the forked pine tree was taken as being northwest of the corner, instead of southwest of it as stated in the field notes,* the tree would support his line instead of Hardgrove's line. (Rep. Tr. pp. 538, 555, 647.) This must have been so, argued respondents, because the scribing on the tree must have faced Ross' line rather than Hardgrove's. The tree was down and dead when found. (Rep. Tr. p. 230.) It had been dead fifty-five or sixty years. (Rep. Tr. p. 422.) No witness saw the tree fall.

The trial Court found for respondents. (Clks. Tr. 260.) *In so doing the Court used the southwest bearing tree as northwest bearing tree.* (Clks. Tr. 238.)

The decision, petitioners submit, flies in the face of the original field notes of the official survey of the government. It also is directly contrary to Section 350 of the Manual of Surveying Instructions, United States Department of the Interior, Bureau of Land Management, upon which all the surveyors who testified purported to base their work. (Jt. Exh. No. 6-A, p. 65; Rep. Tr. p. 62.)

The effect of the decision is to move the southwest corner of Section 34 a distance of 543.65 feet south of where the original field notes place it to be. (Rep. Tr. p. 612.)

Respondents were awarded damages in the amount of $161,588.23 for all of the ore that had been removed from the entire mine. Respondents' surveyors had testified, however, that their line ran *through* the mine, which was narrow at the bottom but broadly benched above (Rep. Tr. pp. 49, 50, 207, 237, 603; *see also,* Rep. Tr. p. 117.) Petitioners' counsel attempted to raise this point by a motion

to reopen cause (Clks. Tr. 241) and in a motion for new trial (Clks. Tr. 253). Both motions were summarily denied.

At motion for new trial, respondents' counsel offered his affidavit late, in clear violation of Code of Civil Procedure Section 659(a). Over objection, is was accepted. (Clks. Tr. 329.)

Thus it will be seen that the controversy hinges upon the position of the south line of Section 34, *Township* 18 *South, Range* 13 *East, M.D.B.M., which is the south boundary of the lands claimed by the respondents.* The survey of this land was made by W. F. Benson for the Government of the United States under contract dated November 11, 1879, and he made the actual survey during the years 1879 and 1881. The official survey thus made was approved by the U. S. Surveyor General for California on October 19, 1881.

Under the survey, patent issued to the predecessor in interest of respondents to the lands described in their complaint. (Plaintiffs' Exh. No. 21.)

Specifically, the principal question in issue is the position of the southwest corner of Section 34, *Township* 18 *South, Range* 12 *East, M.D.B.M., as fixed and established by the official United States survey of Benson.*

It is admitted by all parties that the original corner stake cannot be found at this time. The only definite evidence of its position is by reference to a tree described in surveyor Benson's notes as being a forked pine tree, then twenty-four inches in diameter, and bearing S.26°W., 690 links from that corner. Much testimony was introduced on the point.

The trial Court in its Opinion (Clks. Tr. 237) *concluded that the official field notes of the United States survey were*

in error and that the bearing tree was not the southwest bearing tree for the corner but was the northwest bearing tree, as contended by respondents. In other words, instead of the tree being S.26°W., of the southwest corner of said Section 34, as set forth in official field notes, the trial Court found that the tree was north and west of the corner. (Clks. Tr. 237.) From that opinion we must assume that the Court adopted the bearing for the corner as being N.26°W., 690 links.

The Principal Issue.

The principal issue in this cause is the determination of the location of the South line of Section 34, Township 18 South, Range 13 East, M.D.B.M., which is also the South line of the patented land in that Section owned by respondents, upon which the mining operations of petitioners are alleged to have trespassed. Petitioners claim that their mining operations have been carried on in Section 2, Township 19 South, Range 13 East, M.D.B.M., lying just to the South. Hence, the South line of Section 34 is also the North line of Section 2. The parties are in agreement as to the location of the Southeast corner of Section 34 but are in complete disagreement concerning the location of the Southwest corner thereof. The South line is, of course, a straight line joining these two corners.

That this is the vital, controlling matter in connection with this litigation is recognized by all concerned, as is indicated by the following:

The trial Court's "Memorandum Opinion and Order Relative to Application for Preliminary Injunction", dated July 21, 1955, contains this:

> "The ultimate question to be decided upon the trial of this case is whether the division line between Section 34 in Township 18 South, Range 13 East, M.D.B.

M., and Section 2, Township 19 South, Range 13 East, M.D.B.M., is correctly located North or South of the mine." (Clk's. Tr. p. 59.)

And the trial Court, later, said (Rep. Tr. 1044):

"The main dispute that the Court feels exists in this case is whether or not the tree from which the scribe was taken and presented into evidence is to be deemed the southwest bearing tree or the northwest bearing tree, and it appears pretty obvious that whatever the Court concludes in that would practically decide the case."

In the opinion of the District Court of Appeal (See Appendix) the following appears:

"The primary controversy in this case concerns the location upon the ground of the south boundary line of the Butler property."

This line is also the South line of Section 34 and the North line of Section 2.

Federal Questions of Substance Involved.

The trial Court, by sanctioning reversal of the witness bearing trees for the Southwest corner of Section 34, described in th field notes of the official United States Government survey, approved such a change in that survey as is barred by the applicable decisions of this Court, which have been universally followed by inferior courts throughout the United States. In effect, it permitted respondents to make an unofficial "resurvey" of the south line of said Section 34 which decreased, substantially, the area of the public domain, owned by the United States of America south of the true South line of said Section 34, established by Government Surveyor Benson, on a portion of which petitioners had located a lode mining claim, pursuant to the laws of the United States.

Violation of the applicable governing opinions of this Court certainly presents a Federal question of substance that should be reviewed by this Court with the view of restoring that uniformity of opinion that has hitherto prevailed.

Petitioners respectfully submit that a decrease in the area of land owned by the United States of America, such as is caused in the case at bar by the unwarranted relocation of a Government survey line, is something that the United States Government should be vitally concerned about, also that a Federal question of substance is presented thereby, justifying a review of the entire matter by this Court. The "resurvey" permitted by the trial Court established the Southwest corner of said Section 34 a distance of 543.65 feet south of the true Southwest corner as established by the official Government survey. There is no dispute about the location of the Southeast corner of said Section. The West line of said Section 34 is of course approximately a mile (5,280 feet) away from its East line. Assuming this distance to be 5,250 feet, it is a simple matter to visualize the decrease caused in the public domain as a triangular tract with a base of 543.65 feet and an altitude of 5,250 feet, containing an area of approximately 32¾ acres.

Another Federal question of substance is the possible overall effect of the present judgments in this cause upon the titles to and boundaries of all lands patented and to be patented by the United States Government. The confusion and chaos, and interminable litigation, that conceivably could follow if such judgments permitting a party litigant in an action between private parties to change at will the boundaries of patented lands established by official

United States surveys is appalling. This situation can be remedied only if this Court will grant a review in this cause on a writ of certiorari.

Petitioners persistently urged the State Courts of California—the trial Court, the District Court of Appeal for the Fourth District, and the California Supreme Court—to bar changing of an official United States Government survey of public lands, and uphold the sanctity and inviolability of the Government survey involved in this cause.

In the Trial Court

The "Memorandum of Points and Authorities on Hearing for Order to Show Cause and Restraining Order", filed on behalf of petitioners on July 21, 1955, contains the following (Clks. Tr. 52):

> "In retracing the lines of a government survey, the surveyor must, if possible, resort first to the original monuments, and if the corners cannot then be established, the field notes should be taken and from courses and distances, natural monuments or objects, and bearing trees described therein, he should endeavor to fix the line precisely as called for in the notes and retrace the steps of the men who made the original survey and if by doing so the line can be located, it will control."

Also the following (same page):

> "The lines as originally located must govern. This is true whether they are 'right' or 'wrong'. The only question is: 'Where were the lines run in the field by the government surveyor?'."

Also included is the following (Clks. Tr. 53):

> "The original corners as established by the government surveyor are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly."

Each of these statements is amply supported by authorities which conform to the law as established in opinions of this Court.

On August 3, 1955, a notice of motion to join the United States of America as a party defendant was filed on behalf of petitioners, supported by an affidavit and a memorandum of points and authorities. (Clks. Tr. 68 etc.) The affidavit points out that the principal issue in this cause, according to the pleadings, stipulations of counsel, and evidence already adduced, is the location of a United States township survey line (the South line of Section 34) and that the land North of that line "at the point of conflict" is owned by respondents, the land South of the line at that point being part of the public domain and owned by the United States of America. It further points out that if the contention of respondents is upheld the area of the land owned by the United States of America would be substantially decreased. Therefore, it was contended on behalf of petitioners, the United States of America was an "indispensable party" and should be added as a party defendant. Cited as one authority in support of the motion was: 1 U. S. Comp. Stat. pp. 360 and 699, as amended. The motion was opposed by respondents and was denied by the Court on August 12, 1955, after a hearing. (Clks. Tr. 78.)

On September 12, 1955, counsel for petitioner filed and served notice that a motion for continuance would be made on September 16, 1955, to afford time for the Bureau of Land Management, United States Department of the Interior, to make a resurvey of the boundary line in question. (Clks. Tr. 87.) A supporting affidavit sets forth that petitioners had made a formal application to the Bureau of Land Management for such a resurvey and that the Bureau had agreed to make it, also that petitioners had deposited with the Government the sum of $1,000.00, to cover the cost. The affidavit further advised that there would be a delay in performing the work, because of a shortage of qualified engineers. A continuance until January 16, 1956, was requested to insure completion of the work. Respondents opposed the continuance and the Court denied it.

Included in the Clerk's Transcript (pp. 132, 133, and 134) are "EXTRACTS FROM MANUAL OF SURVEYING INSTRUCTIONS, 1947, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT", submitted by counsel for petitioners, as follows:

> "SECTION 8:
>
> "From the foregoing synopsis of congressional legislation it is evident:
>
> "First: That the boundaries and subdivisions of the public land as surveyed under approved instructions by the duly appointed engineers, the physical evidence of which survey consists of monuments established upon the ground, and the record evidence of which consists of field notes and plats duly approved by the authorities constituted by law, are unchangeable after the passing of the title by the United States.
>
> "Second: That the physical evidence of the original township, section, quarter-section, and other monuments must stand as the true corners of the subdi-

visions which they were intended to represent, and will be given controlling preference over the recorded directions and lengths of line."

"SECTION 237:

"The law provides that the original corners established during the process of the survey shall forever remain fixed in position, even to disregarding technical errors in the execution of the survey, where discrepancies may have passed undetected prior to the acceptance of the survey. . . . The Courts attach major importance to evidence relating to the original position of the monument, such evidence being given far greater weight than the record relating to bearings and lengths of lines. It is the purpose that the monuments shall serve every necessary requirement for the identification of the survey."

"SECTION 316:

"(This Section is concerned with Corner Accessories, and it reads as follows:) The purpose of an accessory is to evidence the position of the corner monument. A connection is made from the corner monument to fixed natural or artificial objects in its immediate vicinity, whereby the corner may be relocated from the accessory, thus in the event of the destruction or removal of the monument, its position may be identified as long as any part of the accessories remains in evidence. The accessories consist of three general classes, one or more of which are to be employed at each and every corner established in public-land surveys (excepting for corners of minor subdivisions and where specifically not required by the Manual text, or omitted by the special instructions), preference being given in the order of their permanence conditional upon the character of the ground in the locality of the monument, as follows:

"(a) Bearing trees, or other natural objects such as notable cliffs and boulders; permanent improvements; reference monuments;

"(b) mound of stone;

"(c) pits and memorials."

The "MEMORANDUM OF POINTS AND AUTHORITIES" submitted at the trial by Petitioners, included the following points (Clks. Tr. pp. 135 to 141, Incl.):

"The question in all cases similar to this is, Where were the lines run in the field by the government surveyor? A government township lies just where the government surveyor lined it out on the face of the earth. These lines are to be determined by the monuments in the field." (Citing authority.)

"In retracing the lines of a government survey, the surveyor must resort first to the original monuments. He must endeavor to fix the line precisely as called for in the notes and retrace the steps of the men who made the original survey, and if by doing so, the line can be located, it will control." (Citing authorities.)

"The original corners must stand as the true corners they were intended to represent, even though not exactly where professional care might have placed them in the first instance. Missing corners must be reestablished in the identical positions they originally occupied. An existent corner is one whose position can be identified by verifying the evidence of the monument, or its accessories, by reference to the description that is contained in the field notes." (Citing the Manual of Instructions for the Survey of the Public Lands of the United States, 1947, as Supplemented, of the United States Government, Department of the Interior, Bureau of Land Management.)

"The Field Notes of the original United States Deputy Surveyor, W. F. Benson, as he proceeded under his contract of November 11, 1879, west along the south boundary of Section 34, deserve special attention in this case. Keeping the Field Notes in mind, it will be readily apparent from the testimony that the survey line upon which the plaintiffs and cross-defendants rely, the so-called Ross-Gentry line, is not, in any sense of the word, a 're-survey' or 'retracement' of Benson's line. Ross and Gentry performed a wholly new, independent survey, just as though no prior survey of the township line had ever been made.

In doing so, they were undoubtedly well intentioned, but they were also clearly in error."

"A patentee, such as was the late Aaron Burr Butler, takes only such land as was included within the original survey of the land conveyed. He or his successors cannot later question the survey as erroneous, although in fact the line in question should have been placed elsewhere. Where it 'should' have been placed is wholly immaterial. Where it was placed controls." (Citing authority.)

"The monuments or marks placed upon the ground by the surveyors in making a survey, constitute the survey, and the courses and distances are only evidence of the survey. Evidence based upon courses and distances from other known points may be admissable to fix a corner, where no corner is found, but never to change the location of an original corner when found." (Citing authorities.)

"Where the existence of the monuments established by a government surveyor in making the original survey is proved, evidence of a line of the survey based upon courses and distances, being of a lower order than evidence thereof based upon the monument, raises no material conflict in support of a finding as to the location of the line." (Citing authority.)

"In resurveying, the first consideration is the restoration of what the record (the field notes) purports to be the original conditions. In this the discovery and identification of original monuments, marks, and corner positions is paramount. This stage of the evidence is regarded as the basic control." (Citing, again, the manual of surveying instructions and also four cases decided by this Court.)

And:

"The original corners as established by the initial government surveyor, or the places where they were originally established, are the best evidence in cases of this type and are conclusive on all persons owning or holding with reference thereto." (Citing authorities.)

The "MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL", filed December 22, 1955 (Clks. Tr. 294 to 307, Incl.), includes the following (Clks. Tr. 295):

"It requires no citation to state that plaintiffs in an action of this kind must recover upon the strength of their own title, having placed that title in issue, rather than upon the weakness (if any) of their adversaries' title. What is plaintiffs' title? It is a United States Patent, conveying by legal sub-division and according to an official plat. In such a case the field notes of the survey, upon which the plat purports to be based are part of the patent. They are considered as (by reference) being written across the face of the patent. *Cragin* v. *Powell*, 128 U.S. 691, 696 (9 S. Ct. 203, 32 L. Ed. 566, 567); *Ayers* v. *Watson*, 137 U. S. 584 (11 S. Ct. 201, 34 L. Ed. 803); *Powers* v. *Jackson*, 50 Cal. 429 (1875); *Larson* v. *Larson*, 89 Cal. App. 2d 846, 202 P. 2d 121 (1949); *Phelps* v. *Pacific Gas & Electric Co.*, 84 Cal. App. 2d 243 190 P. 2d 209 (1948).

"What the Court has permitted the plaintiffs to do is to vary their own deed. The law is to the contrary. Parol evidence has never been admissible to contradict or vary the express language of a deed. As Justice Sanderson stated in *Fratt* v. *Woodward*, 32 Cal. 219 (1867), 'a mere matter of convenience or taste can not be allowed to overrule the express language of a deed'. Plaintiffs contention in essence, no matter how much they (or the Court) may talk around the point, is that the field notes are inaccurate. This contention is shown clearly by the evidence which appears in the record. The undisputed rule, however, is that the survey, of which the field notes are a part, may not be collaterally attacked. *Phelps* v. *Pacific Gas & Electric Co.*, *supra*, commented upon in Volume 30 of California Law Review, at page 364. As the United States Supreme Court stated in *Cragin* v. *Powell*, *supra*, the consequences of inadvertence, mistakes, irregularities and fraud in the public land sur-

veys are subject to exclusive supervision of the General Land Office (now the Bureau of Land Management). The Courts have no concurrent or original power to make similar corrections.

"To put the rule another way, a survey is to be located by the calls of its own notes, and such notes can not be varied by extrinsic evidence. *Texas Co.* v. *Van Deventer*, 290 S. W. 690 (Tex. Civ. App. 1926).

Also included is the following (Clks. Tr. 298):

"There are other cases. They uniformly hold that where an object is identified as that described in the field notes, the description must stand. In *LaTerre Co.* v. *Billiott's Shell Island, Inc.*, 20 F. Supp. 106 (1937), the District Judge stated as follows: 'If an object is identified as that mentioned in the survey, whether right or wrong, it must be conclusively accepted as binding on the state and on all parties subsequently acquiring rights therefrom'. The decision in *Galt* v. *Willingham*, 11 S. (2d) 757 (1927), is also in point.

"As stated in Section 350 of the Manual of Survey Instructions, United States Department of the Interior, Bureau of Land Management, 1947, 'an existent corner is one whose position can be identified by verifying the evidence of the monument, or its successors, by reference to the description that is contained in the field notes . . . .' This section, nor any other section which appears in the Manual, does not contemplate the variance of the description contained in the field notes by extrinsic evidence."

Referring to the tree that the expert witnesses for all parties agreed was the "Southwest bearing tree" referred to in Government Surveyor Benson's field notes, the memorandum contains the following:

"The Court has taken this tree as the Northwest bearing tree. This action is against well recognized rules of law which have been settled for generations past."

Then it is set forth that such field notes are part of the patent and are considered as being "written across the face of the patent". In support of this contention two governing decisions of this Court are cited. (*Cragin* v. *Powell,* 128 U.S. 691, 696, 9 S. Ct. 203, 32 L. Ed. 566, 567, and *Ayers* v. *Watson,* 137 U.S. 584, 11 S. Ct. 201, 34 L. Ed. 803. Also cited are three leading California cases.

In argument on the motion for new trial, counsel for petitioners protested the changing of the Benson field notes comprising part of the original Government survey as being contrary to law. (Rep. Tr. 1085 etc.) He called the trial Court's attention to the memorandum of points and authorities, the latter including the leading case of *Cragin* v. *Powell,* decided by this Court. His argument included the following:

> "In conclusion on the first point, that the decision is against the law, we respectfully submit that there is no more right of this Court to change the position of the bearing tree as it is described in the field notes, than there would be to change the nature of the grant itself, because in effect that is what the Court has done. If this decision were allowed to stand, titles would be in jeopardy everywhere. The solemn grant of the sovereign Government certainly cannot be ignored, and even more certainly not at the instance of plaintiffs, who must rely on the strength of their own title."

IN THE DISTRICT COURT OF APPEAL.

In petitioners' opening brief filed in this cause in the District Court of Appeal, the following was included, under the heading "Questions Involved":

> "2. In any action involving a boundary line, may the patentee or his successor in interest to the land involved, change the official survey for his own convenience?

"For clearer presentation, this question is divided into:

"(A) To what extent do the field notes and the plat of survey control the patent?

"(B) Where a section corner is found in accordance with the field notes of the official government survey, may such corner be ignored and resort had to procedures to determine lost or obliterated corners?

"(C) Inasmuch as the field notes of a government survey are a part of the patent issued, may a Court vary or modify the grant by changing any of its terms in an action between private parties?

"(D) A grantee of lands from the United States takes the grant as laid down by the United States, and the boundaries may not be changed or modified even by the sovereign itself."

The points noted were argued at length in the brief with citation of ample supporting authorities.

IN THE CALIFORNIA SUPREME COURT.

In the petition for hearing filed in the Supreme Court of the State of California, the following were included as grounds for granting the petition:

"1. The judgments of the trial Court and the District Court of Appeal in this cause are in direct violation of well-established law and a hearing by this Court is necessary to secure uniformity of decision.

"2. The primary issue involved in this cause is the sanctity of United States Government surveys covering patented lands, and a hearing before this Court is necessary to settle a most important question of law affecting all patented lands throughout the United States."

On page 28 of the said petition, the following legal proposition was cited with ample supporting authorities, including

the leading case of *Cragin* v. *Powell*, 128 U.S. 691, 32 L. Ed. 566, 9 S. Ct. 203:

> *"In any Action Involving a Boundary Line of Patented Lands, the Patentee or His Successors in Interest May Not Change the Official Survey for His or Their Own Convenience."*

And on page 49, the following was included:

> "The primary issue involved in this cause is, of course, *the validity and sanctity of an original, approved United States Government survey covering patented lands.* As is universally conceded, no change or correction can be made in such a survey, even by Courts, in a controversy between private parties, once a patent has been granted.
>
> "Much more is at stake in this cause, therefore, than the mere rights and interests of defendants. If the judgments of the trial Court and the District Court of Appeal are allowed to stand, sanctioning the right to 'correct' and make changes in an original Government survey covering patented lands, and, at the same time, lending approval to gross laches in asserting adverse claims to mining property, a dangerous precedent will have been established, existing controlling law governing these matters will have been ruled out and rendered for naught, and multitudinous suits filed by parties seeking similar relief are a distinct possibility."

ARGUMENT.

I.

IN ANY ACTION INVOLVING A BOUNDARY LINE OF PATENTED LANDS, THE PATENTEE OR HIS SUCCESSORS IN INTEREST MAY NOT CHANGE THE OFFICIAL SURVEY FOR HIS OR THEIR OWN CONVENIENCE.

That an official United States Government survey covering patented lands is not subject to attack in an action between private parties is such fundamental law that it would almost seem to insult the intelligence of the distinguished Justices of this Court to cite any authority in support thereof. However, it is considered essential to direct attention to what this Court held in *Cragin* v. *Powell*, 128 U.S. 691, 32 L. Ed. 566, 9 S. Ct. 203, the leading case on the subject, cited repeatedly in this cause by petitioners not only in the trial Court but also in the subsequent appeal proceedings.

In that case, a petition was filed in the lower Court whereby Powell and two others sought to have the Court determine the boundary between land owned by them and contiguous land owned by Cragin, all of the land being patented land originally sold by the Government after it had been officially surveyed as part of the public domain by one Connelly and the plat of such survey had been filed in the United States Land Office. One McLeran, appointed by the Court, made a resurvey, and he reported "that he considered this survey of Connelly so incorrect, and the traces of its lines and corners so difficult to identify, that he was unable to locate any proper line between the lands in question," except upon the basis of a resurvey of the entire township made personally by one Gorlinski, a United

States deputy surveyor. McLeran proceeded to run a line considered by him to be the proper boundary between the lands in question and recommended its adoption by the Court. The McLeran resurvey greatly prejudiced the rights of Cragin, who had been in peaceable and continuous possession of his land for more than thirty years, without notice of any adverse claims whatsoever, but nevertheless it was adopted by the lower Court.

The opinion contains the following, at page 696:

> "It is well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself."

At page 697, the following appears:

> "The statutes of the United States make it the duty of the surveyor general to note 'all water courses over which the line he runs may pass; and also the quality of the lands.' Rev. State. § 2395, subdiv. 7. And they provide that a copy of the plat of survey shall be kept for public information in the office of the surveyor general, in the offices where the lands are to be sold, and also in the office of the Commissioner of Public Lands. *They further provide that 'the boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended and the length of such lines, as returned, shall be held and considered as the true length thereof.'* Rev. Stat. § 2396, subdiv. 2.
>
> "The surveyor, McLeran, insists not only in his original report of his survey, but also in his second explanatory report, and in his oral evidence, that this governmental survey is incorrect; some of it more

incorrect than the rest, but especially erroneous in the length of its lines and in the location of Bayou Four Points on the portions of the sections patented to the appellees. The plat, he reports, is totally inconsistent with that of the governmental survey, and should have been rejected by the court below.

"*Whether the official survey made by Connelly is erroneous,* or should give way to the extent of its discrepancies to the survey reported by McLeran, *is a question which was not within the province of the court below, nor is it the province of this court to consider and determine.* The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the government. The correction of these mistakes and abuses has not been delegated to the judiciary, except as provided by the act of June 14, 1860, 12 Stat. 33, c. 128, in relation to Mexican Land claims, which was repealed in 1864, 13 Stat. 332, c. 194, § 8." (Emphasis supplied.)

With regard to "resurveys" such as are referred to to above, the opinion contains the following (Page 698):

"But the Commissioner of the General Land Office very soon put an end to this system of resurveys, and in a letter to the surveyor general, which throws no little light upon the subject, he says:

" 'The making of resurveys or corrective surveys of townships once proclaimed for sale is always at the hazard of interfering with private rights, and thereby introducing new complications. A resurvey, properly considered, is but a retracing, with a view to determine and establish lines and boundaries of an original survey, . . . but the principle of retracing has been frequently departed from, where a resurvey (so called) has been made and new lines and boundaries have often been introduced, mischievously conflicting with the old, and thereby affecting the areas of tracts which the United States had previously sold and otherwise disposed of.' "

Commencing on the same page, the opinion contains this:

> "That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; *and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient.*" (Emphasis supplied.) "*Steel* v. *Smelting Co.*, 106 U.S. 447, 454-5, and cases cited in that opinion; *United States* v. *San Jacinto Tin Co.*, 10 Sawyer, 639, affirmed in *United States* v. *Flint*, 4 Sawyer, 42, affirmed in *United States* v. *Throckmorton*, 98 U. S. 61; *Henshaw* v. *Bissell*, 18 Wall, 255; *Stanford* v. *Taylor*, 18 How. 409; *Haydel* v. *Dufresne*, 17 How. 23; *West* v. *Cochran*, 18 How. 403; *Jackson* v. *Clark*, 1 Pet. 628; *Niswanger* v. *Saunders*, 1 Wall. 424; *Snyder* v. *Sickles*, 98 U. S. 203; *Frasher* v. *O'Connor*, 115 U. S. 102; *Gazzam* v. *Phillips*, 20 How. 372; *Pollard* v. *Dwight*, 4 Cranch, 421; *Taylor* v. *Brown*, 5 Cranch, 234; *McIver* v. *Walker*, 9 Cranch, 173, 177; *Craig* v. *Radford*, 3 Wheat. 594; and *Ellicott* v. *Pearl*, 10 Pet. 412.
>
> "The reason of this rule, as stated by Justice Catron in the case of *Haydel* v. *Dufresne*, is that 'great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do.' 17 How. 30."

In the *Cragin* case, the judgment of the lower court was reversed.

Courts throughout the United States, including the State of California, have steadfastly followed the law thus laid down by this Court.

That the plat and field notes are as much a part of the patent itself as though written out therein, is of ancient origin in California, has been consistently adhered to from at least as long ago as 1870, and is fully established by the following:

Seaward v. *Malotte*, 15 Cal. 305, 306;
Chapman v. *Polack*, 70 Cal. 487, 494, 11 P. 764;
Foss v. *Johnstone*, 158 Cal. 119, 128, 110 P. 294;
Weaver v. *Howatt*, 161 Cal. 77, 80, 118 P. 519;
Weaver v. *Howatt*, 171 Cal. 302, 306, 152 P. 925;
Phelps v. *Pacific Gas & Electric Co.*, 84 C.A. 2d 243, 190 P. 2d 209 (Hearing den. Apr. 29, 1948);
Larson v. *Larson*, 89 C. A. 2d 846, 202 P. 2d 121;

And many others.

The testimony in this cause clearly shows without contradiction, because admitted by all parties in interest, that the southwest corner of Section 34 is neither lost nor obliterated. The witness bearing tree described in the original Benson field notes as the southwest bearing tree for the corner is on the ground and recognizable, although it had fallen many years prior to trial of this case.

Respondents do not dispute the fact that an official United States Government survey covering patented lands may not be changed in an action between private parties. But, they contend, the official survey has not been changed. The quotations from the testimony of respondents' engineer-surveyor witnesses (Ross and Gentry), herein set forth with Record references, should convince this Honorable Court of the fact that the two witness bearing trees to the Southwest corner of Section

34 described in the field notes of Benson's survey were "reversed" in order to establish that corner at the point where respondents desired it should be established, 543.65 feet south of its true location established by the Benson survey, without such "reversal". If this "reversal", of which the trial Court was fully advised, as the Record shows, does not constitute such a change in the official Government survey as is barred by law, the English language no longer means what it says.

And yet, the trial Court condoned and sustained this illegal procedure, predicating its judgment thereon and awarding damages against petitioners in the amount of $161,550.23. This judgment, and that of the District Court of Appeal affirming it, are in direct violation of the law as laid down by this Court.

Review of this matter on a writ of certiorari and reversal of these judgments are necessary to reestablish that uniformity of opinion that has heretofore prevailed in connection with this most vital matter.

Petitioners contend that the location of the southwest corner of Section 34 was definitely established by the United States Government surveyor, Benson, in 1879, and that the location is fixed by the two witness bearing trees for the corner mentioned in his field notes. It is fundamental law that the field notes are as much a part of the survey as though they were contained on the survey plat. In the case at bar, the Benson field notes were introduced and received in evidence as plaintiff's exhibits (Rep. Tr. pp. 37 and 40), and plaintiffs are bound by them. It is equally fundamental that a Government survey covering patented lands is not subject to attack in a suit between private parties and cannot be changed or "corrected" even by a Court.

If the southwest corner of Section 34 located in accordance with the Benson field notes, unchanged and untampered with, as the law demands, is accepted as the true corner, the resulting south boundary line of the Section falls north of "Mistake Mine" and none of petitioners' mining operations have been on respondents' property.

But respondents, through the simple expediency of "reversing" the two bearing trees witnessing the said southwest corner in the Benson field notes, seek to move that corner south a distance of 543.65 feet, the obvious object being to have it appear that all, or practically all, of defendants' mining operations were performed north of the south boundary line of the Section so established and, hence, on respondents' property.

The Verdi Development Company Case.

The attention of the Court is respectfully directed to the case of *Verdi Development Company, et al.* v. *Dono-Han Mining Company, et al.*, 141 A.C.A. 154, 296 P. 2d 429, decided by the very same District Court of Appeal on April 25, 1956. That case and the case at bar are identical in that both involve mining operations on land concerning which the location of a section corner, and, hence, the boundary line of the property, are in dispute. As the opinion states:

> "All other questions in the case are insignificant compared with this central and determinative enquiry."

In the *Verdi* case, the law respecting official United States Government surveys, as hereinabove set forth, was stated and applied. The judgment of the trial Court was reversed.

The decisions of that Court in the *Verdi* case and in this cause cannot both be right. They are directly in conflict with each other. This conflict should be resolved by this Court through review on a writ of certiorari.

IMPORTANT REFERENCES TO TESTIMONY VITALLY AFFECTING ISSUES IN THIS CAUSE.

Southwest Corner of Section 34 Established by Benson Field Notes.

Witness Ross, in response to the request of counsel for respondents, read the following from the Benson field notes certified copies of which were introduced and received in evidence as Plaintiffs' Exhibits Nos. 2 and 4, relating to the common corner of Sections 33 and 34 (the southeast corner of Section 33 and the southwest corner of Section

34), the location of which is in dispute, constituting the principal issue in this cause, and governs the location of the south line of said Section 34 and respondents' property (Rep. Tr. p. 47):

> "At 80 chains set a granite stone 15 by 19 by 10 in a stone mound 4½ feet in diameter at the base by 2 feet in height, for the corner to Sections 33 and 34, from which bears a forked pine 24 inches in diameter south 26, west 690 links distant. A pine 10 inches in diameter north 56, west 380 links distant."

The following testimony was then adduced:

> "Q. Is that the end of it?
> "A. That is the end."

Testimony of Witness Ross Concerning Bearing Trees.

The testimony of Witness Ross contains the following, under cross-examination by counsel for Petitioners (Rep. Tr. p. 68):

> "Q. How many bearing trees are called for at the corner of the section?" (That is, the southwest corner of Section 34.)
> "A. Two bearing trees are called for.
> "Q. And will you please state generally what a bearing tree is.
> "A. A bearing tree is a tree that has been marked by the original surveyor as he went across that particular line. He placed it and scribed it to fit the corner that he is referring it to.
> "Q. And I think we have already agreed that those trees control the location of the corner?
> "A. That is right.
> "Q. Now what were you looking for as the bearing tree called for as being northwest?
> "A. It was a ten inch pine.
> "Q. And where was that located?
> "A. North 56 degrees, west 380 links.

"Q. And what were you looking for as the tree called for as being southwest of the corner in question?

"A. That was a forked pine 24 inches in diameter, south 26, West 690 links distant.

"Q. In other words that tree was called for as being—

"A. Southwest.

"Q. Southwest of the corner?

"A. That is right.

"Q. At a certain angle?

"A. That is right.

"Q. 690 links, is that correct?

"A. That is right."

Under re-cross-examination by counsel for petitioners, the following Ross testimony was adduced (Rep. Tr. pp. 75 and 76):

"Mr. Frame: Mr. Ross, you stated a few minutes ago in response to a question by Mr. Thomas that the corners are where you find them.

"A. They are.

"Q. Is that correct?

"A. That is correct.

"Q. Now suppose that you found a corner say at the southwest corner of Section 34, and you were satisfied that it was the correct corner; would it make any difference to you if the position of that corner varied somewhat from where you thought it ought to be?

"A. No.

"Q. In other words I take it that you do not correct the work of the original surveyor?

"A. *You do not correct the work of the government surveyors. That is one thing you cannot do.*" (Emphasis supplied.)

After discovery by Witness Hardgrove of the Southwest bearing tree marking the Southwest corner of Sec-

tion 34, the testimony of Ross included the following (Rep. Tr. p. 519—Rebuttal examination by Mr. Thomas):

"Q. Now at the time that you first went up there did you meet with Mr. Hardgrove at the site of this fallen tree?

"A. I did.

"Q. And did Mr. Hardgrove show you the tree and the place where he had found defendants' Exhibit J?

"That is right.

"Q. And did you investigate the area yourself and investigate the tree yourself in conjunction with the piece of wood Exhibit J to determine whether or not the tree had been or is an authentic bearing tree?

"A. I did.

"Q. Mr. Ross, is this tree from which defendants' Exhibit J was taken an authentic bearing tree for the southwest corner of Section 33?

"A. It is. The southeast corner of Section 33.

"Q. The southeast corner of Section 33?

"A. Yes.

"Q. And the southwest corner of Section 34, which are the same point?

"A. That is correct."

The following Ross testimony concerning the reversal of the bearing trees is significant (Rep. Tr. p. 527):

"Q. What did you do in that regard?

"A. In that regard *we tried to reverse the location of the trees. In other words the northwest tree, we put that as a* 24 *inch pine, and we tried to go southwest to the* 10 *inch, which would be exactly the reverse of what Mr. Benson's notes called for. We did that.* (Emphasis supplied.)

"Q. Were you reversing the bearings and the descriptions, or just reversing the descriptions of the trees?

"A. Just changing the description of the trees only. Not the bearings and distances whatever."

The following testimony adduced from Witness Ross by the trial court establishes conclusively that the Court was fully advised concerning the reversal of the bearing trees to fit the line sought to be established by respondents as the south line of Section 34 (Rep. Tr. p. 555):

"The Court: Let me ask a question.

"Mr. Frame: Yes, your Honor.

"The Court: Q. The southwest tree that we are talking about—let's see. That you say fits with this—

"A. The bearings and distances.

"Q. Bearings and distances. *Is that on the proviso though that you reverse the trees?*

"A. *The trees. That is correct.*

"Q. *That is reverse the trees as reflected in Benson's notes?*

"A. *Yes.*" (Emphasis supplied.)

"Reversal" Corroborated by Witness Gentry.

The testimony of Witness Gentry, associate of Ross, examined in rebuttal by Mr. Thomas, includes the following (Rep. Tr. p. 647):

"Q. Did you find that rock mound where it should be according to Mr. Benson's notes if the temporary corner set by you was the true southwest corner of 34.

"A. By that—it fit the calls in Mr. Benson's notes.

"The Court: *Well is that on the basis of reversing the bearing trees?*

"Mr. Thomas: *Yes.*

"Q. *In other words, you first reversed the bearing trees and* established the temporary corner, or *established your southwest corner of* 34?

"A. *That is correct.*" (Emphasis supplied.)

Thus it will be seen that the trial Court was fully aware that the bearing trees had been reversed to fit the line

sought to be established by respondents as the south line of Section 34, in effect "correcting" the field notes of Benson, the original Government surveyor, which witnesses for respondents and also respondents counsel agreed was something that could not be done. And the trial Court, despite this, adopted the finding that this line was the "true south line" of Section 34 and that petitioners mining operations had all been north of that line.

Witness Gentry's testimony, under cross examination by counsel for petitioners, includes the following (Rep. Tr. p. 96):

> "Q. I take it you agree with the general proposition that it is the job of the resurveyor to retrace the footsteps however vanishing they might be of the original surveyor?
>
> "A. That is right.
>
> "The Court: I think that that is beyond question.
>
> "Mr. Thomas: Yes, your Honor.
>
> "The Court: I mean the law requires it.
>
> "Mr. Frame: It may be beyond question. I was merely trying to point it out, your Honor.
>
> "The Court: I know, but the law requires that. And you just wanted to know whether this witness had done that?
>
> "Mr. Frame: That is correct, your Honor.
>
> "The Court: Yes, all right."

Error in Government Survey Charged by Witness Ross.

The testimony of Witness Ross, under cross-examination by counsel for petitioners, includes the following (Rep. Tr. p. 538):

> "Q. Now briefly it is your position then that Mr. Benson must have erred in his notes?
>
> "A. Well my position is this, that someone who made the notes up reversed the position of those two trees."

There is absolutely no basis for this assumption by Ross. The field notes introduced into evidence by respondents are certified as being correct and must be so accepted by respondents. It is conceded that the field notes comprise part of this official U. S. Government survey, also that such a survey is not subject to attack in a suit between private parties. The Benson survey must therefore be accepted as correct by the parties to this cause, and also by any Court considering the matter, and it cannot be changed, altered, or "corrected" at the whim of some surveyor on the assumption that the original Government surveyor erred in some manner. As a matter of fact, such a survey and the boundaries established thereby stand and are inviolate regardless of any errors that may have been made. This is fundamental law requiring no further citation of authorities.

At page 557 of the Reporter's Transcript, Ross testified that "there are numerous errors in those notes" (that is, Benson's field notes), "the calls do not fit in many cases," referring to the line erroneously established by the trial Court, just a short distance south of the line he first established.

The testimony of surveyor Hardgrove and cadastral engineer Dupree R. Averill demonstrates conclusively that the Hardgrove line rejected by the trial Court coincides remarkably with the line established by the Benson field notes. This appears concisely in the Reporter's Transcript at page 1001, *et seq.*

It is not surprising that Messrs. Ross and Gentry, in running a line commencing 543.65 feet South of the true location of the Section corner, experienced difficulty in making the calls of Benson's field notes fit the terrain over which they traveled.

More Testimony Concerning Southwest Bearing Tree.

All of the engineer-surveyor witnesses (Ross and Gentry, for plaintiffs, and Hardgrove and Averill, for defendants) testified that the witness bearing tree discovered by Hardgrove (from which the blaze—Defendants' Exhibit "J"—was taken) is the witness bearing tree described in the Benson field notes as "a forked pine 24 inches in diameter" witnessing the common corner of Sections 33 and 34 (the southeast corner of Section 33 and the southwest corner of Section 34) and located south and west thereof.

The testimony of Witness Ross, under cross-examination by counsel for petitioners, contains the following (Rep. Tr. p. 537):

Q. Now Mr. Ross, you say that you looked at the tree that Mr. Hardgrove has taken?

"A. I did.

"Q. As being the southwest bearing tree?

"A. I did.

"Q. I take it you inspected it carefully?

"A. I did.

"Q. Is that right? And that is a big tree, isn't it?

"A. It is a big tree. There is no question about the size. There is no question about the location of the scribing. The tree is a bearing tree without any question of a doubt.

"Q. And it is a forked pine, is it not?

"A. It is a forked pine.

"Q. *And you would agree, would not not, that it fits the description which appears in Mr. Benson's notes for the southwest bearing tree?*

"A. *That is correct.*

"Q. *It fits the description?*

"A. *It fits the description. There is no question at all about that.*

"Q. *No question at all about that?*

"A. *Not at all.*" (Emphasis supplied.)

Witness Gentry, also under cross-examination, testified as follows (Rep. Tr. p. 691):

"Q. Mr. Gentry, did you examine the tree that Mr. Hardgrove and Averill had taken to be the southwest bearing tree?

"A. Yes sir, I did.

"Q. And do you concede that it fits the description given in Mr. Benson's field notes for the southwest bearing tree?

"A. Yes. I would believe it would be possible for it to be the tree for the southwest bearing tree."

And (Rep. Tr. p. 692):

"Q. *Well Mr. Gentry, in your opinion is it the tree that Mr. Benson called for as the southwest bearing tree?*

"A. That is possible, *yes.* It is the only evidence that we have left of a large tree, *and I say that it would be the southwest bearing tree as called for in Mr. Benson's notes.*" (Emphasis supplied.)

The testimony of Witness Hardgrove includes the following, under direct examination by counsel for petitioners (Rep. Tr. p. 336):

"Q. Now Mr. Hardgrove, I show you at this time a large piece of wood which appears to have markings on it. Will you—can you identify that piece of wood?

"A. I can. *The markings or scribings are the marks of the original surveyor on the southwest bearing tree for sections* 33-34. *They are complete.*

"Mr. Frame: I would like to offer this piece of wood in evidence.

"The Court: That will be received as Defendants' Exhibit J.

". . .

"Mr. Frame: Q. Now Mr. Hardgrove, referring you to Defendants' Exhibit J, will you read the markings which appear upon it.

"A. The letter B, letter T, letter S, figure 3, figure 3, letter T, figure 1 and 8, S, R, 1, 3 and E. That is

bearing tree for Section 33, township 18 South, Range 13 East.

"Q. *Does that mean that it pointed to the corner, the southwest corner?*

"A. *Very definitely.*

"Q. *Of* 34. *In other words, the* 33-34 *corner?*

"A. *That is right.*

"Q. *Now Mr. Hardgrove, when a tree such as this one is found, must it control the location of the corner?*

"A. *Definitely must.*

"Q. Using this particular tree, did you re-establish the corner?

"A. I did.

"Q. And did you remonument it?

"A. I did." (Emphasis supplied.)

Witness Averill, also under direct examination, testified with regard to this matter as follows (commencing at Rep. Tr. p. 420):

"Q. I show to you at this time Defendants' Exhibit No. I-3 purporting to be a forked pine tree lying on the grounds. Is that the tree you found?

"A. Yes, that is the tree we found.

"Q. *Now Mr. Averill, in your opinion was this tree the southwest bearing tree to Section* 34?

"A. *That was the Benson bearing tree.*

"Q. *The southwest bearing tree to the corner of Section* 34?

"A. *Corner of Section* 33.

"Q. Which is also—

"A. *Which is also the corner of Section* 34. There is an identity of that section, but that tree refers to Section 33 and it is so marked.

"Q. Is that also, Mr. Averill, the southwest corner of Section 34.

"A. *The corner of the two sections are identical. The southwest corner of* 34 *is the southeast corner of Section* 33.

"Q. Now generally speaking, Mr. Averill, on what do you base your opinion?

"A. On personal experience and knowledge of Mr. Benson's work, and the characteristics of his work. I have followed him for many years." (Emphasis supplied.)

No Basis for Reversal of Bearing Trees.

It was stipulated by both sides that both Hardgrove and Ross located the true *southeast corner of Section* 34. (Rep. Tr. P. 43.) It was also stipulated that both sides accept another corner as the *southwest corner of Section* 33. The proportional line first relied upon by plaintiffs as the south line of Section 34 was obtained simply by drawing a straight line between these two corners and locating the *southwest corner of Section* 34 on that line half way between. The southwest corner so located was "about 30 to 35 feet" north and "about 20 feet" east (Rep. Tr. p. 534) of the southwest corner established by reversing the bearing trees described in Benson's field notes, which was held by the trial Court, petitioners contend erroneously, to be the southwest corner of Section 34.

The following excerpt from the testimony of witness Ross is of interest (Rep. Tr. p. 46):

"Mr. Thomas: Mr. Ross, you say you searched in the area where you placed your stake for the southwest corner of 34. Over what area did you search?

"A. We searched for several hundred feet on each side of our particular line" (that is, the line obtained by the proportional method), "and both back and ahead of where we felt the corner was going. In other words we just took circles. We kept widening out, trying to find something acceptable."

It is strange that this search by respondents' engineer-surveyor witnesses did not result in discovery of the bearing tree for the corner later found by witness Hardgrove. It is also strange that they did not discover at that time

the pieces of burnt and charred wood near a few roots in the ground which they later purportedly did discover and "transformed" into the "forked pine 24 inches in diameter" described in Benson's field notes.

In this connection, the following testimony by Witness Ross, under direct examination by counsel for respondents, should also be of interest (Rep. Tr. p. 47):

"Q. Mr. Ross, did you find the forked pine to the south?

"A. We did not.

"Q. *Is there anything in that area which could have been that forked pine?*

"A. *No.*

"Q. Did you find that pine to the north?

"A. No.

"Q. *Is there anything there which could have been that pine?*

"A. *Not that we could find. There had been a fire through all that country, and everything is practically out.*

"The Court: That forked pipe was to the south?

"A. Yes, sir, to the south." (Emphasis supplied.)

Later on, when someone had conjured up the idea of reversing the bearing tree described in the Benson field notes, respondents' witnesses, miraculously, and despite the fact that "everything" was "practically out" in the area, as testified to by Ross, found some pieces of burnt and charred woods on the ground, near some roots but completely detached therefrom, which the trial Court, without any support whatsoever in the evidence adduced, assumed to be the "forked pine 24 inches in diameter" described in Benson's field notes as the *southwest bearing tree* but construed by the trial Court to be the *northwest bearing tree,* instead. Respondents' witnesses conceded that they reversed the two bearing trees described in Benson's

field notes in order to establish the location of the south line of Section 34 where they wanted it. The record shows that the trial Court was fully advised about this reversal of the bearing trees. The District Court of Appeal erred in affirming this reversal of the bearing trees. Certainly, Witness Ross did not definitely identify the pieces of charred wood and the roots nearby as the "forked pine 24 inches in diameter" described in Benson's field notes, as is inaccurately stated in that Court's opinion. (See Appendix.) This most important inaccuracy was called to the attention of the District Court of Appeal in a petition for rehearing, but it was not corrected.

As a matter of fact, witness Ross, while inferring that pieces of burnt wood that he found Southwest of the corner he set *could be* the remains of a bearing tree, never positively so stated. In this connection, Ross testified with some heat as follows under examination by petitioners' counsel (Rep. Tr. p. 546):

> "Q. Now, Mr. Ross, you say that you found a bearing tree to the southwest, and you say—what did that tree look like?
>
> "A. Pardon me. Just don't misquote me. *I said we found a tree.*" (Emphasis supplied.)

Defendants submit that the "discovery of the Southwest bearing tree," southwest of the "Ross-Gentry" corner, proclaimed to have taken place never took place at all.

It is respectfully submitted that the District Court of Appeal, to say the least, is inaccurate when it states in its opinion that Ross identified "the root system and burned remains" of this tree "as the 24-inch pine tree in question." (See Appendix.)

One Bearing Tree Involved Here.

Under examination by counsel for respondents, witness Ross defined "a bearing tree" as follows (Rep. Tr. p. 44):

> "A bearing tree is a tree which has been marked by the original surveyor, and has been scribed *to show exactly* what the corner is, or *where the corner is found.* That is all." (Emphasis supplied.)

He also testified as follows, under cross-examination by counsel for petitioners (Rep. Tr. p. 61):

> "Q. How important are these various trees in surveying? Suppose you come to a corner and you find a bearing tree, does that control?
> "A. That controls."

Witness Ross also testified (Rep. Tr. p. 61) that "you have to take the things found on the ground as far as you can that the original man" (in the case at bar, Surveyor Benson) "used, and if you can find anything that he has used, you are bound by that."

The only bearing tree witnessing the disputed section corner was located by witness Hardgrove. Surveyor witnesses for both parties were unanimous that this bearing tree was described in the original field notes as the Southwest bearing tree.

It is clear from the record that even the trial Court in arriving at its decision considered only one "bearing tree" —the one discovered by witness Hardgrove—claimed by defendants to be the "Southwest bearing tree" described in Benson's notes but converted by respondents into the "Northwest bearing tree." The trial Court made this clear in its letter to counsel, dated November 22, 1955, advising them of his decision. (Clks. Tr. 236.) The trial Court stated (Rep. Tr. 1044): "The main dispute that the Court feels exists in this case is whether or not the

tree from which the scribe was taken and presented into evidence is to be deemed the southwest bearing tree or the northwest bearing tree, and it appears pretty obvious that whatever the Court concludes in that would practically decide the case."

The trial Court, without any warrant whatsoever, sanctioned the reversal of what the original survey contained, permitting the original Benson line to be moved 543.65 feet South, "blanketing" a substantial portion of petitioners' mining operation, and bringing about the wrongful assesment of $161,558.23 in damages against them.

II.

THE FINDING OF THE TRIAL COURT, AFFIRMED BY THE DISTRICT COURT OF APPEAL, THAT RESPONDENTS ARE NOT GUILTY OF LACHES CONSTITUTES A DISTINCT ABUSE OF DISCRETION CAUSING GREAT INJURY AND PREJUDICE TO PETITIONERS.

The undisputed facts bearing on the question of laches are set forth hereinabove in the section of this petition entitled "Statement of Case." No facts contrary to these have at any time been assumed by petitioners.

Petitioners respectfully submit that whether or not those facts do warrant the defense of laches is a question of law which properly may be, and should be, inquired into by this Court, pursuant to its inherent power to consider also other questions properly raised in the lower Courts. Without question, the defense of laches has been properly raised in this proceeding from the very start. This Court is asked to determine whether or not, in view of the undisputed facts in this cause, the trial Court abused its discretion in finding that respondents were not guilty of laches.

United States Supreme Court on Laches.

In the case of *Patterson* v. *Hewitt*, 195 U. S. 309, the opinion of this Court by Mr. Justice Brown, contains the following (page 317):

> "The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this Court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, *lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay.*" (Emphasis supplied.)

And, at page 320, the following:

> "There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Fergusson, that they were put in possession of this valuable property. If appellants had expected a share in this

property they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. *While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.*" (Emphasis supplied.)

The case at bar is, of course, such a case, and defendants respectfully submit that the law as stated in the *Patterson* case should have been applied and the doctrine of laches "relentlessly enforced" in this case. They submit that, under the circumstances, the trial Court grossly abused its discretion when it adopted the finding that respondents were not guilty of laches and that the District Court of Appeal erred in affirming that finding.

Many cases from all jurisdictions supporting defendants' contentions might be cited. California cases, both Supreme Court and District Courts of Appeal, holding

plaintiffs guilty of laches because of inexcusable delay of varying length, and resulting prejudice to defendants, are legion. Some of them are the following:

Warfield v. *Anglo & London Paris National Bank*, 202 Cal. 345, 355, 356;

Stowe v. *Kaetzel*, 38 Cal. App. 2d 356, 359;

Morrow v. *Coast Land Co.*, 29 Cal. App. 2d 92, 107;

Neet v. *Holmes*, 25 Cal. 2d 447, 457;

Vesper v. *Forest Lawn Cemetery Assn.*, 20 Cal. App. 2d 157, 166;

Livermore v. *Beal*, 18 Cal. App. 2d 535;

Goodfellow v. *Barritt*, 130 Cal. App. 548, 560;

And from Montana and Wyoming the following cases are of interest:

Hynes v. *Silver Prince Mining Co.*, 86 Mont. 10, 16;

Eblen v. *Eblen*, 68 Wyo. 353, 375.

Conclusion.

The contention of witnesses for respondents is that the field notes of Benson's original Government survey are "incorrect" and that the bearing trees described therein should be "reversed". The trial Court, as the Record shows, was fully aware of this "reversal", constituting a "correction" or change the original Government survey. and sanctioned it, petitioners claim erroneously and illegally.

By the simple expedient of reversing the two bearing trees, the Southwest corner of Section 34 was "moved" a distance of 543.65 feet south of its true location as established by the Benson survey. This, of course, moved the South line of the said Section, which is also the South

line of the patented land owned by respondents, south a corresponding distance, so as to place substantially all of petitioners' mining operations on respondents' said land. On the other hand, if the corner established by Benson is accepted as the true Southwest corner of said Section, none of the said mining operations have been on respondents' land.

The following comment was made by Honorable Thomas M. Cooley, Justice of the Supreme Court of Michigan, in his opinion in the case of *Diehl* v. *Zanger*, 39 Mich. 601 (Page 605):

> "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity.
>
> "But no law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance,—a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned."

So even assuming that respondents are correct in their contention that the field notes of Government Surveyor Benson are inaccurate and incorrect, and that the witness Benson are inaccurate and incorrect, it is beyond the province of any Court to "change" or "correct" Benson's

original survey through reversal of the two bearing trees described in the field notes.

That is exactly what the trial court did in the case at bar, and its erroneous judgment in this regard was affirmed by the District Court of Appeal. These judgments violate the decisions of this Court respecting Government surveys covering patented lands.

Petitioners seek review through a writ of certiorari not only for their own benefit but also to avoid the "incalculable mischief" that would undoubtedly follow, generally, so far as boundaries of patented lands are concerned, if these erroneous judgments are permitted to stand.

Respectfully submitted,

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APPENDIX.

OPINION OF DISTRICT COURT OF APPEAL

FOURTH DISTRICT, CALIFORNIA

Butler v. *Holman*, 303 P. 2d 573

Filed November 15, 1956.

Appeal from a judgment of the Superior Court of Fresno County, George M. DeWolf, Judge. Affirmed.

Ted R. Frame, Coalinga, Calif., Albert W. Dilling, Chicago, Ill., and Charles L. Gilmore, Sacramento, Calif., for appellants.

Aten & Aten, Fresno, Calif., Henry T. Leckman, Coalinga, Calif., and Rowell, Lamberson & Thomas, Fresno, Calif., for respondents.

Coughlin, Justice *pro tem.*

In 1923, Aaron B. Butler received a patent from the United States Government to land in Fresno County, described as the South one-half of the Southeast quarter and the South one-half of the Southwest quarter of Section 34, Township 18 South, Range 13 East, M.D.B.M. Upon his death the plaintiffs Butler were appointed executors of his will. Several years thereafter, the defendants James and Thickstun located the "Mistake Lode Mining Claim" upon a deposit of chrome ore which they contend is situated immediately south of the Butler property, in Section 2, Township 19 South, Range 13 East, M.D.B.M. They leased the mine to the defendant Holman. An extensive development program was undertaken resulting in the excavation of a large pit, by bulldozers, and the removal of several thousand tons of ore. The executors first learned of this mining activity through information furnished by some hunt-

ers, who had been in the vicinity. An investigation ensued which led the plaintiffs to believe that the mine was on the Butler property. Thereupon the complaint in this action was filed seeking damages for the ore removed; an accounting to determine the amount thereof; and an injunction to restrain any further trespass.

The defendants filed an answer and cross-complaint by which they denied the material allegations of the complaint; set up the defense of laches; sought to quiet their title to the mine; and asked for an injunction against the plaintiffs.

From a judgment in favor of the plaintiffs awarding damages in the sum of $161,558.23, the defendants appeal.

The primary controversy in this case concerns the location upon the ground of the south boundary line of the Butler property.

In 1879, W. F. Benson, a United States Deputy Surveyor, made a survey of Township 18 South, Range 13 East M.D.B.M. in which the Section 34 referred to in the Butler patent is located. The monument marking the Southeast corner of said section is intact. However, the monument marking the Southwest corner thereof cannot be found. In his field notes Benson, the surveyor, records a tie of this Southwest corner to two trees: one to the Southwest and the other to the Northwest. From the section corner the tree to the Southwest was described as a forked pine, 24" in diameter, bearing South 26 degrees west, 690 links distant, and the tree to the Northwest was described as a pine 10" in diameter, bearing north 56¼ degrees west, 380 links distant.

In an effort to determine the location of the true south line of Section 34, the parties to this action caused several

surveys to be made. Each resulted in a different boundary. In the course of these surveys, a surveyor by the name of Hardgrove found the fallen trunk of a forked pine tree which, undoubtedly, was one of the trees referred to by Benson in his field notes, for it carried the inscription "B T S 33 T 18 S R 13 E" (meaning, bearing tree—Section 33, Township 18 South, Range 13 East). Hardgrove identified this tree as the 24-inch Southwest bearing tree described in Benson's field notes, and, using it as such, established the Southwest Section corner in question.

Shortly thereafter, a surveyor by the name of Ross discovered the root system and burned remains of another tree, farther to the south, which he identified as the 24-inch pine tree in question. On October 20, 1955, using this tree as the Southwest bearing tree described in Benson's field notes and using the described tree found by Hardgrove as the Northwest bearing tree described in those notes, and following the calls and distances recorded therein, Ross established what he testified was the Southwest corner of Section 34.

The Ross section corner is south of the Hardgrove section corner.

Hardgrove never located a witness tree northwest of the corner which he established.

The trial court found that the corner established by Ross was the true section corner and described the southerly end line of Section 34 accordingly. The pit from which the defendants had excavated ore is north of this line; within Section 34; and on the property of the plaintiffs.

The defendants claim that, in accepting the Ross corner as the true section corner, the court found that the 24-inch forked pine tree referred to in the Benson field notes was

not southwest of the corner, as recorded therein, but was northwest of the corner; that in so doing the court refused to follow those notes, contrary to the rule of law which provides that the field notes of an approved government survey are conclusive on the owner of patented land described by the use of such survey (*Weaver* v. *Howatt*, 171 Cal. 302, 306 (152 Pac. 925); *Chapman* v. *Polack*, 70 Cal. 487, 492 (11 Pac. 764); *Trabucco* v. *Sorrels*, 113 Cal. App. 401, 403 (298 Pac. 521); *Phelps* v. *Pac. Gas & Electric Co.*, 84 Cal. App. 2d 243, 247 (190 Pac. 2d 209)).

The defendants' contention is based upon the false premise that the scribed tree, which the court found was northwest of the Ross corner, was the 24-inch forked pine tree referred to in the field notes. The evidence upon this point is in conflict. There is substantial proof, by fact and by inference, that this scribed tree was not the 24-inch forked pine tree in question. The finding in this regard is adequately supported by testimony from which the court could conclude that this tree was not 24 inches in diameter at the time of the survey, whereas the tree to the southwest, located by Ross, approximated this size; that the blaze on the scribed tree, when it was standing, faced in the direction of the corner as established by Ross, which connected it with that corner in view of the accepted custom of surveyors to cause the blaze on a witness tree to face the corner to which it is tied; and that this tree was in Section 33, requiring the common corner for Sections 33 and 34 to be to its southeast, because approved surveying practice required a tree to be marked to agree with the section in which it stands.

Contrary to the contention of defendants, the trial court did not change the position of any of the trees described in the field notes. Instead, it found that the remains of the tree described by Ross was the tree which Benson re-

corded as bearing southwest of the section corner, and that the fallen tree discovered by Hardgrove was the tree referred to as bearing northwest of that corner.

In addition to the testimony with respect to the bearing trees referred to in the field notes, there is other evidence that the location of the disputed section corner is at the place designated by Ross in his survey of October 20, 1955. In their opening brief, respondents cite eight different factual situations, supported by substantial evidence, each of which corroborates the finding of the trial court.

The defendants next attack the judgment on the ground that the amount awarded as damages is excessive.

The court found that the defendants converted in excess of $600,000 worth of chromium and other substances which they had mined from the Butler property and from which they netted a profit of $161,558.23. The latter sum was awarded as damages.

It is contended that, at least, a part of the ore in question came from the defendants' property. However, this contention is based on testimony respecting the location of the mine in relation to a boundary line fixed by a survey which the court did not accept as establishing the true line. Although, in their opening brief, the defendants say that the award of damages is the result of either "passion and prejudice on the part of the trial court" or "pure speculation", yet, at the hearing before this court, they admitted that if the boundary line as established by the judgment was sustained, their claim that the award included damages for ore taken from their own property was without merit.

The trial of this case started October 17, 1955. At that time, the defendants still were conducting their mining operations, and continued to do so thereafter. The com-

plaint alleged a continuing trespass, and asked for an accounting. The defendant Holman furnished the Court with a statement of all sales up to October 3, 1955. This statement did not include payments for ore shipped before that date, upon which returns had not yet been made. The judgment was based upon an accounting up to October 3, and reserved to the plaintiffs the right to a further accounting, for ore removed after October 3, and for ore removed before that date but for which payment had not been received by the defendants. From the time ore is shipped to the mill, until payment is received by the shipper, it must be milled into concentrates which are shipped to a purchasing agency, which, in turn, makes certain tests preliminary to acceptance or rejection, and, if accepted, the price is fixed, depending upon the quality of the ore. It is apparent that the time and amount of payment are subject to many variable factors.

Although the court was authorized to adjust the rights of the parties up to the time of entry of judgment (*Union Oil Company of Cal.* v. *Mutual Oil Co.*, 19 Cal. App. 2d 409, 412 (65 Pac. 2d 896)), under the circumstances of this case, it was proper to reserve to the plaintiffs the right to a supplemental accounting as "The relief administered in equity is such as the nature of the case and the facts as they exist at the close of the litigation, demand; . . ." (*Collins* v. *Sargent*, 89 Cal. App. 107, 112 (264 Pac. 776).)

It is further contended that the evidence does not sustain a finding that the defendants received a net profit of $161,558.23. The record contains substantial evidence from which it may be concluded that the amount of ore concentrates sold by the defendants was between 6,000 and 7,042.86 tons; that the average price of concentrates was between $100 and $115 per ton; that the total gross re-

ceived for this ore was between $600,000 and $809,830 or more; that the actual return paid to James and Thickstun, as lessors, was $66,075.40; that $5,482.83 was paid to an investment group as interest on their investment; and that the actual return to the defendant Holman, as net profit, was an additional 15 per cent of the gross return. This evidence would support a judgment for as much as $193,032.73. The findings of fact are based on such of the evidence as established damages in the lesser sum of $161,558.23.

The defendants charge the trial judge with bias because he did not accept the testimony of Mr. Holman that his estimated profit was "somewhere between Sixty-eight and Seventy thousand dollars" instead of his testimony that such estimated profit was 15 per cent of a gross of $600,000, or $90,000. Stated thusly, the charge is reduced to an absurdity.

In this same vein, the defendants pose the question: "Was further bias shown when the trial court permitted plaintiffs to file late pleadings?" Reference is made to an order denying defendants' request to strike an affidavit and memorandum of authorities in connection with a motion for a new trial. The affidavit was in the nature of an argument rather than a statement of facts. The matters contained in the memorandum could have been presented orally at the hearing. It is not alleged that any prejudice resulted from this order and none appears from the record. The complaint is trivial and, even if well taken, is not cause for a reversal. (*Dam* v. *Lake Aliso Riding School,* 6 Cal. 2d 395, 398 (57 Pac. 2d 1315).).

As a defense to the equitable relief prayed for in the complaint, the defendants invoke the doctrine of laches. To sustain their contention that the adverse decision of the trial court on this defense was error, the defendants

assume a state of facts contrary to the findings. The issue thus raised is the sufficiency of the evidence to sustain the findings in question.

In November, 1951, the premises now known as "Mistake Lode Mining Claim" were located as a Placer and described as being in Section 2 of Township 19 South, Range 13 East M.D.B.M. In May, 1953, the same property was located as a Lode.

Some development work took place after the original location, but the mine was not actually in operation until January, 1953. By the time this action was commenced an extensive operation was under way, and the mine pit had been opened to a hundred feet in depth.

The plaintiffs first learned that mining operations were going on in the general area in August, 1954. Thereafter they saw their attorney; caused a survey to be made; after this survey by letter dated April 12, 1955, notified the defendants that they were operating on the Butler property; and in June, 1955, brought this action.

The land in question is hilly and covered with brush and trees. It has been used by one of the Butler brothers, for grazing purposes, under a lease from the plaintiffs. There is no evidence that either of the plaintiffs had seen the property from 1926 until 1955.

The defendants constantly have contended that their mine was not on the Butler property; refused to stop operations; obtained a preliminary injunction to prevent the plaintiffs from interfering with the same; and, now, on appeal, still contend that their claim is located in Section 2 and not in Section 34.

Laches is an unreasonable delay in asserting a right which causes such prejudice to an adverse party as renders

the granting of relief inequitable (*Cahill* v. *Superior Court*, 145 Cal. 42, 46 (78 Pac. 467)). In determining whether a delay has been unreasonable, the circumstances in each case must be taken into consideration (*Hiatt* v. *Inland Finance Corp.*, 210 Cal. 293, 300 (291 Pac. 414)). Many factors may be involved, amongst which is the plaintiffs' knowledge of the defendants' wrongful acts (*Verdugo Canon Water Company* v. *Verdugo*, 152 Cal. 655, 674 (93 Pac. 1021); *Alexander* v. *State Capital Company*, 9 Cal. 2d 304, 313 (70 Pac. 2d 619)).

There is no evidence that the plaintiffs knew that the defendants were operating a mine located in Section 34, until after the survey, following a consultation with their attorney. The defendants urge that the plaintiffs had constructive knowledge of this fact, because they had the means of knowledge, citing *Lady Washington Consolidated Company* v. *Wood*, 113 Cal. 482, 487. Whether the plaintiffs had constructive knowledge of the unlawful acts of the defendants, under the circumstances of this case, was a question of fact.

Likewise, whether any delay by the plaintiffs in bringing this action was unreasonable, also, was a question of fact, concluded by the finding of the trial court based on substantial evidence (*Newport* v. *Hatton*, 195 Cal. 132, 148 (231 Pac. 987); *Williams* v. *Marshall*, 37 Cal. 2d 445, 455 (235 Pac. 2d 372)).

In addition, the record substantiates a finding that the defendants were not prejudiced by any alleged delay. Unless the party asserting the defense of laches has been injured by the delay complained of no prejudice has occurred. (*Alexander* v. *State Capital Company, supra*, page 313.) It may be inferred that the defendants would have proceeded with the development of the mine regardless of

the time suit was commenced. Moreover, the award in favor of the plaintiffs was limited to the net profits received by the defendants.

The appellants were given a fair hearing. They complain that the trial judge was biased. There is not the slightest basis for this contention. The findings about which the defendants complain are supported by adequate and substantial evidence. This case falls within the oft repeated rule that the weight of the evidence, the inferences to be drawn therefrom, and the credibility of witnesses are not matters for consideration by an appellate court. (*Hardin* v. *San Jose City Lines, Inc.*, 41 Cal. 2d 432, 436 (260 Pac. 2d 63); *Chan* v. *Title Ins. & Trust Company*, 39 Cal. 2d 253, 258 (246 Pac. 2d 632); *Massow* v. *Gianaclis*, 120 Cal. App. 2d 24, 27 (260 Pac. 2d 655).)

The judgment is affirmed.

COUGHLIN
J. *Pro Tem.*

We concur:
BARNARD, P.J.
GRIFFIN, J.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 787

J. R. HOLMAN, JACK M. JAMES, LAVONNA JAMES, ANDREW J. THICKSTUN, and ALTA MAE THICKSTUN,

Petitioners,

vs.

LILLIE BUTLER and ERNEST W. BUTLER, Executrix and Executor, respectively, of the Last Will and Testament of AARON BURR BUTLER, deceased, G. M. RUSSELL, R. W. RUSSELL, and E. F. CHAMBERS,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents Lillie Butler and Ernest W. Butler, Executrix and Executor, respectively, of the Last Will and Testament of Aaron Burr Butler, deceased, G. M. Russell, R. W. Russell, and E. F. Chambers respect-

fully present their brief in opposition to Petitioners' Petition for Writ of Certiorari on file with this Court.

PRELIMINARY STATEMENT.

Petitioners' assertion that a Federal question is presented by this case is based upon the false, and actually frivolous statement that the Trial Court changed or relocated a United States Government survey line. It will be hereinafter demonstrated that not only have Petitioners assumed this factual situation contrary to the truth, but that even under this false assumption there would be no Federal question presented.

As to a factual statement of our own, Respondents do not believe that any useful purpose would be served by including one herein. However, certain comments on Petitioners' statement are deemed essential to a correct understanding of this case. In the first place, Petitioners' "Statement of Facts" (Petition, pp. 4-24) includes considerable by way of argument. There are numerous authorities cited in those pages to the effect that in determining the location of the original Government survey, court and surveyor alike must follow the footsteps of the original surveyor because the original corners and line established by the original Government surveyor are conclusive without regard to whether he may have erred in establishing such corner and line.

With these authorities Respondents agree, for as was said in the leading California case of *Weaver v.*

Howatt, 171 Cal. 302, 152 Pac. 925, it is the duty of court and surveyor alike to locate the true line, and to do so in a manner least inconsistent with the Government survey, notes, and plats. Nor do Respondents quarrel with Petitioners' statement that the principal issue in this litigation was the determination of the true location of the Southwest corner of Section 34, Township 18 South, Range 13 East, Mount Diablo Base and Meridian, as it was established by the original Government surveyor (Petition, p. 10).

At several points, however, in their "Statement of Facts", Petitioners deliberately contradict the record and the judgment of the Trial Court. On page 6, they state that the record shows that Petitioners James and Thickstun ". . . went upon surveyed public land of the United States in the Northwest quarter (NW¼) of Section 2, Township 19 South, Range 13 East, M.D.B.&M., and located the James-Thickstun No. 1 Placer Mining Claim." The very fact in issue was whether Petitioners were on public land in the Northwest quarter of Section 2, or on Respondents' land in the Southwest one-half of Section 34. The Trial Court found as a fact from the evidence that petitioners entered on Respondents' property in Section 34.

On page 8, Petitioners state that a straight line projected from the Southeast corner of Section 34 to the Southwest corner of Section 34 ". . . in accordance with the original field notes, ran north of the mine." The true location of this southerly line of Section 34 was the very fact in issue, and the Trial Court determined from the evidence that its true location is

and always was south of the mine (Clks. Tr. p. 261, line 19, p. 262, line 6).

On page 9, Petitioners state, "The trial Court found for Respondents. In so doing the Court used the southwest bearing tree as northwest bearing tree." This is the same false statement that has run through all of Petitioners' briefs on appeal in the California courts and concerning which the District Court of Appeal commented as follows:

> "The trial court found that the corner established by Ross was the true section corner and described the southerly end line of Section 34 accordingly. The pit from which the defendants had excavated ore is north of this line; within Section 34; and on the property of the plaintiff.
>
> The defendants claim that, in accepting the Ross corner as the true section corner, the court found that the 24-inch forked pine tree referred to in the Benson field notes was not southwest of the corner, as recorded therein, but was northwest of the corner; that in so doing the court refused to follow those notes, contrary to the rule of law which provides that the field notes of an approved government survey are conclusive on the owner of patented land described by the use of such survey (*Weaver v. Howatt,* 171 Cal. 302, 306 (152 Pac. 925); *Chapman v. Polack,* 70 Cal. 487, 492 (11 Pac. 764); *Trabucco v. Sorrels,* 113 Cal. App. 401, 403 (298 Pac. 521); *Phelps v. Pac. Gas & Electric Co.,* 84 Cal. App. 2d 243, 247 (190 Pac. 2d 209)).
>
> The defendants' contention is based upon the false premise that the scribed tree, which the

court found was northwest of the Ross corner, was the 24-inch forked pine tree referred to in the field notes. The evidence upon this point is in conflict. There is substantial proof, by fact and by inference, that this scribe tree was not the 24-inch forked pine tree in question. The finding in this regard is adequately supported by testimony from which the court could conclude that this tree was not 24 inches in diameter at the time of the survey, whereas the tree to the southwest, located by Ross, approximated this size; that the blaze on the scribed tree, when it was standing, faced in the direction of the corner as established by Ross, which connected it with that corner in view of the accepted custom of surveyors to cause the blaze on a witness tree to face the corner to which it is tied; and that this tree was in Section 33, requiring the common corner for Sections 33 and 34 to be to its southeast, because approved surveying practice required a tree to be marked to agree with the section in which it stands.

Contrary to the contention of defendants, the trial court did not change the position of any of the trees described in the field notes. Instead, it found that the remains of the tree described by Ross was the tree which Benson recorded as bearing southwest of the section corner, and that the fallen tree discovered by Hardgrove was the tree referred to as bearing northwest of that corner.

In addition to the testimony with respect to the bearing trees referred to in the field notes, there is other evidence that the location of the disputed section corner is at the place designated by Ross in his survey of October 20, 1955. In their open-

ing brief, respondents cite eight different factual situations, supported by substantial evidence, each of which corroborates the finding of the trial court." (Petition, Appendix pp. 55-57.)

It is quite true that Petitioners, as they state on page 14, have persistently urged the State Courts of California "to bar changing of an official United States Government survey of public lands, and uphold the sanctity and inviolability of the Government survey involved in this cause." It is equally true that those courts have just as persistently pointed out to Petitioners that no such change was made.

Also on page 9 Petitioners state, "The effect of the decision is to move the southwest corner of Section 34 a distance of 543.65 feet south of where the original field notes place it to be." This is merely a variation of the same false charge that the Trial Court changed the survey, and like the rest, will hereinafter be shown to be contradictory of the evidence and of the findings of the court. Petitioners' assertion on page 10 that "The trial Court in its Opinion concluded that the official field notes of the United States survey were in error" is a similar reiteration of the falsity in contradiction of the record, as pointed out by the District Court of Appeal in the above quoted portion of its Opinion.

The foregoing are only exemplars of this false premise which runs throughout the Petition in varying forms and constitutes the sole basis of Petitioners' attempt to invoke the jurisdiction of this Court. The only other comment on this "Statement of Facts"

which Respondents deem pertinent here concerns the recitation of Petitioners' efforts to secure a delay, ostensively so that the Bureau of Land Management, United States Department of the Interior, could make a resurvey. The implication intended by Petitioners is obvious. However, the true situation is contained in the record (Clk. Tr. pp. 87-102) which shows that Petitioners already had had ample time to secure such a survey; that Petitioners were in possession of the mine while asking a delay of at least four months; that the United States Government chrome purchasing program was drawing to a close with no assurance of a further appropriation for its continued existence; and that the Court denied the continuance after full hearing.

As heretofore mentioned, Respondents have no quarrel with Petitioners' authorities setting forth the principles which must be followed in locating original Government survey lines. Both Petitioners and Respondents have offered the same authorities and espoused these same principles throughout the whole of this case. The discussion which follows will demonstrate that the Trial Court followed these same principles and decided only the factual question, to-wit, the determination of the position on the ground of the Southwest corner and southerly boundary of said Section 34, Township 18 South, Range 13 East.

DISCUSSION.

I.

EVEN WERE IT TRUE THAT THE JUDGMENT OF THE TRIAL COURT DID NOT CONFORM TO THE ORIGINAL SURVEY, THERE WOULD BE NO FEDERAL QUESTION INVOLVED.

Petitioners seek to invoke the jurisdiction of this Court by attempting to show that the United States has an interest in the outcome of the case. In support of their quest, they assume that the Trial Court changed and relocated the original line, and then assert that this change decreases the public domain, which fact, they say, presents a Federal question (Petition, pp. 13-15). Even if this were true, there would be no Federal question involved. The United States is neither a party to the action nor bound by the judgment.

As this Court stated in *United States v. Lee,* 106 U.S. 196, 222, 27 L. Ed. 171, 182:

> "... since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of *Carr v. United States,* already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."

and in *Shulthis v. McDougal,* 225 U.S. 561, 569, 56 L. Ed. 1205, 1211:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily,

or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws."

Petitioners can point to no place in the record where either Respondents, the Trial Court, the District Court of Appeal, or the Supreme Court of the State of California have disagreed with or rejected the principle that the original Government survey is conclusive on the parties. Early in the trial, the following colloquy took place after an assertion of this principle:

"The Court. I think that that is beyond question.

Mr. Thomas. Yes, your Honor.

The Court. I mean the law requires it.

Mr. Frame. It may be beyond question. I was merely trying to point it out, your Honor.

The Court. I know but the law requires that. And you just wanted to know whether this witness had done that?

Mr. Frame. That is correct, your Honor." (Rep. Tr. p. 96, lines 16-23).

Respondents reaffirmed these principles in their brief before the Trial Court (Clk. Tr. p. 158). The District Court of Appeal recognized them (Petition, Appendix pp. 55-56). And finally, again, in their

Answer to Petition for Hearing in the Supreme Court of the State of California, at page 15 thereof, Respondents said:

> "The general principle contended in all of the cases cited by Appellants is that the important determination which the Trial Court must make is that of the location of the original survey upon the ground as evidenced by the physical features, monuments, accessories to monuments, etc. Respondents have no quarrel with any of the opinions cited and, in fact, adopt them completely. The Trial Court in the instant case has decided the true original location of the Southwest corner of Section 34 and the south boundary line of that Section. The decision of the Trial Court was made with the cases cited by Appellants before it. These are the same cases cited by Respondents, and the Trial Court followed the authority of these cases to the letter."

There being no disagreement on the law, the judgment is a determination of fact of the original location of the section corners and line, and Petitioners have wholly failed to bring themselves within the principles enunciated by this Court in *Lynch v. People of New York*, 293 U.S. 52, 54, 55 S. Ct. 16, 17:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the

judgment as rendered could not have been given without deciding it."

What is applicable here is the following statement of this Court in the case of *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175, 178, 58 S. Ct. 849, 851:

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

II.

THE TRIAL COURT DECIDED ONLY A QUESTION OF FACT, TO WIT, THE LOCATION OF THE ORIGINAL LINE ESTABLISHED BY THE UNITED STATES GOVERNMENT SURVEY, AND DID NOT CHANGE OR RELOCATE THAT LINE.

That the above statement is true is well known to Petitioners. Yet, in an effort to support their charge that the Court changed the United States Government's survey, Petitioners assume that the Court did so, and use that assumption as their premise. The task before the Trial Court, was, or course, to determine where the original Government surveyor established the Southwest corner monument of said Section 34 and the South line of that section, for, dependent upon the location of this line as originally surveyed in 1879, the mine in question was on Respondents' property north of the line or upon Government land open to entry south of the line.

The Trial Court heard this case for 8 days (October 17, 1955 to October 21, 1955; October 24, 1955 to October 26, 1955) and rendered its decision after argument

and briefs had been submitted. In its Minute Order of November 22, 1955, the Court stated:

> "The judgment of the Court is that the last survey line of Ross and Gentry is the true South boundary line of Section 34, Township 18 South, Range 13 East, M.D.B&M." (Clk. Tr. p. 236, line 17.)

The Court also stated in that Order:

> "After carefully studying all of the evidence in this case the Court is of the fixed opinion that the preponderance of evidence proves that the bearing tree which was first discovered by Defendants' witness, Mr. Hardgrove, is the Northwest bearing tree, as contended for by the Plaintiffs. The Court is convinced that this is true because of the fact that it is much more probable that when the tree fell it rolled not more than 90 degrees, rather than from 180 to 220 degrees, as argued by the Defendants. Additional reasons which support this conclusion are found to some extent in the physical inspection of Defendants' Exhibit 'J', and from the fact that if the tree is used as a Northwest bearing tree, the calls of Mr. Benson's original field notes seem to fit very easily into place" (Clk. Tr. p. 237, line 22).

Defendants' Exhibit "J" therein referred to is the piece of wood bearing the scribing which was removed from the tree by Mr. Hardgrove, Petitioners' surveyor, prior to the trial. The Court's reference to the tree being the Northwest bearing tree "as contended for by the Plaintiffs," is a direct finding that it in fact is the Northwest bearing tree, and the Court changed nothing of the original survey.

The field notes of the original surveyor refer to the Northwest bearing tree for the corner monument at the Southwest corner of Section 34 as a 10-inch pine, and refer to the Southwest bearing tree as a 24-inch pine (Plaintiffs' Exhibit 4-a, right hand side).

It is quite true that both Mr. Ross and Mr. Gentry, Respondents' surveyors, at first thought that the descriptions of the bearing trees had been reversed in the notes, although Mr. Gentry was doubtful even then, and felt that the tree found by Mr. Hardgrove, Petitioners' surveyor, and which Petitioners contend is the 24-inch Southwest bearing tree, was actually a smaller tree and more closely fitted the proper description of the Northwest bearing tree, to wit, the 10-inch pine (Rep. Tr. p. 692, lines 7-12). After Mr. Hardgrove had brought in the blazed piece of wood (Defendants' Exhibit "J") from the tree which he said was the Southwest bearing tree (Rep. Tr. p. 319, line 6 to p. 337, line 15), Mr. Ross, over the violent objections of Petitioners (Rep. Tr. p. 446, line 18 to p. 454, line 23), was permitted to examine that tree and to make a further investigation in the area.

In so doing, Mr. Ross found that as a surveyor he was unable to accept Mr. Hardgrove's corner because it did not fit any of the calls in the original surveyor's notes in any direction, North, East, South or West (Rep. Tr. p. 518, line 19 to p. 526, line 13). Because he had seen similar discrepancies in field notes before (Rep. Tr. p. 529, line 24 to p. 530, line 2), Mr. Ross checked it out by using this tree as the Northwest bearing tree rather than the Southwest bearing tree

as Mr. Hardgrove contended it to be (Rep. Tr. p. 527, line 3 to p. 528, line 11). Upon doing this he found, at the point where a Southwest bearing tree should be, the root system of a pine tree and the burned remains thereof lying nearby (Rep. Tr. p. 528, line 12 p. 531, line 6, p. 556, lines 4-22).

At that time, Respondents' surveyor, Mr. Ross, felt that the tree descriptions had been reversed in the notes, either at the time they were written or subsequently by a transcriber (Rep. Tr. p. 537, line 7 to p. 538, line 11), and that these tree remains which he found where the notes called for the Southwest bearing tree to be were remains of a 10-inch pine. This was subsequently cleared up, however, by Mr. Swanson, Petitioners' own forestry expert, who testified that the piece of the tree which Mr. Ross brought in (Plaintiffs' Exhibit 28), had been about 15 or 20 feet up in the tree (Rep. Tr. p. 664, line 8 to p. 669, line 22, p. 683, lines 19 to 21), so that it was actually a much larger tree, and by Mr. Emmert, Respondents' forestry expert, who examined the root system and socket and other remains and testified that this tree was, in his opinion, 20 to 24 inches in diameter at breast height (Rep. Tr. p. 835, line 13 to p. 840, line 26).

The balance of Mr. Emmert's testimony also cleared up the apparent confusion by showing that the tree found by Mr. Hardgrove was a smaller tree, and that the blaze (Plaintiffs' Exhibit "J") which Petitioners removed from that tree in all probability faced to the Southeast, rather than to the Northeast (Rep. Tr. p. 819, line 11 to p. 870, line 3).

Every single reference to the testimony of Mr. Ross and Mr. Gentry in Petitioners' Petition is a reference to testimony given by them *before* Mr. Emmert took the stand and pointed out that the tree found by Mr. Hardgrove was a smaller tree than the tree to the South, the root system of which had been found by Mr. Ross. Respondents, after Mr. Emmert's testimony, steadfastly contended that the original surveyor's notes were correct and that the tree was and is the Northwest bearing tree as described in those notes, so that there was no necessity to reconstruct them.

In their closing argument before the Trial Court, Respondents said, "Counsel has assumed a wrong premise in assuming that we are stating that the notes must be reversed. We are asking no such thing" (Rep. Tr. p. 1021, line 5 to p. 1024, line 20).

On Petitioners' motion to set aside the submission and reopen the case before the Trial Court had rendered its judgment, the following colloquy occurred (Rep. Tr. p. 1052, line 25 to p. 1054, line 16):

> "Mr. Frame. Well may I offer a couple of compliments (sic) your Honor. In the first place I have a little trouble with Mr. Thomas' theory, inasmuch as all of his surveyors, both of his surveyors and the ones we produced, all agree, and it appears in the record that the tree found by Mr. Hardgrove and Mr. Averill does fit the description contained in the notes for the southwest bearing tree.
>
> The Court. I think that that is correct. I mean I think that it does fit Mr. Benson's notes. The question that Mr. Thomas would have to be urged upon the Court is that Mr. Benson's notes are incorrect.

Mr. Thomas. No, your Honor. No, your Honor.

The Court. For the southwest bearing tree. You would have to urge that.

Mr. Thomas. No, your Honor.

Mr. Frame. He is arguing against his own beliefs then.

Mr. Thomas. The manner in which that thing was presented to us, it turns up they had known it for three weeks, and then finally brought this thing in, and we went up there and found that there is a fork in that pine, yes. But what is a forked pine? That tree Mr. Emmert testified had forked when it was thirty-five to forty years old. Above half the trees up there are forked trees.

The Court. But Mr. Thomas, here is what I am talking about: The notes in effect say that this tree is in Section 33. Neither side contends that it stands in Section 33. So that—

Mr. Thomas. Your Honor, I contend that it does stand in Section 33.

Mr. Frame. The record——

The Court. You contend that, don't you.

Mr. Thomas. Certainly.

The Court. Wait a minute. I didn't state it correctly. You do not contend that the southwest bearing tree stands in Section 33; you contend that the northwest bearing tree stands in Section 33?

Mr. Thomas. Correct.

The Court. And your contention is that Mr. Benson's notes have reference to the northwest bearing tree?

Mr. Thomas. Yes.

The Court. Isn't that what you are contending?

Mr. Thomas. That it was the northwest bearing tree to which Mr. Benson referred."

In their Trial Brief before the Trial Court, Respondents stated as follows (Clk. Tr. p. 159, line 7 to p. 160, line 12):

"As the Court has indicated one of the main factors in this case is the determination of whether this blazed tree found by Mr. Hardgrove is the Northwest bearing tree, as Plaintiffs contend, or the Southwest bearing tree as Defendants contend.

To determine this we must examine all the evidence which bears either way and make a determination 'in a manner least inconsistent with the government surveys, notes and plats.'

After Defendants brought in evidence of this tree with their own interpretation of its significance and Plaintiffs' experts were permitted, over protest, to examine the tree and re-examine the area, in the light of this new evidence Mr. Ross and Mr. Gentry came to the conclusion that although the tree appeared to fit the description for the Southwest bearing tree, (24 inch forked pine) it did not fit anything else connected with the notes or plats as the Southwest bearing tree, and, therefore, they checked it out to see what would happen if they used it as the Northwest bearing tree. Upon doing this they came upon the mound for the Northwest corner of Section 2, and the root system of a tree where the Southwest bearing tree should be.

Until Mr. Emmert, Plaintiffs' forestry expert, was able to examine the blazed tree and the evidence of the other tree to the South it was felt

> that either Mr. Benson, or whoever copied his notes had inadvertently transposed the descriptions of the trees. However, it now appears more likely that Mr. Benson's notes are correct and that the blazed tree found by Mr. Hardgrove is actually the Northwest bearing tree. If this be true there is no need to reconstruct Mr. Benson's notes in any particular since everything falls neatly into line."

And at the close of the Brief, Respondents stated:

> "It is not even necessary to correct Mr. Benson's notes with regard to the description of the witness trees. When the blazed tree was found and its true significance established it provided the key which made all else fit into place, and enabled the re-establishment of the Southwest corner of Section 34 by Mr. Ross."

Thereafter, the Trial Court made its Findings and Conclusions, wherein it found:

> ". . . that it is true that the location of the true Southwest corner of Section 34, Township 18 South, Range 13 East as established by the United States Government Survey in 1879, is at a point established by A. J. Ross, duly licensed surveyor, on October 20, 1955 . . ." (Clk. Tr. p. 261, lines 19-23).

In the face of the foregoing facts, Petitioners persist in stating that the Court was fully aware that the bearing trees must be reversed in order to fit the line established by Respondents' surveyors. This is wholly refuted by the above mentioned arguments before the Trial Court, by that Court's Minute Order and Find-

ings above mentioned, and by the fact that the court repeatedly during the trial referred to the principles that the original survey is the controlling factor (e.g. Rep. Tr. p. 417, lines 3-6).

But these trees are not the only evidence supporting the judgment. There is the discovery of the original surveyor's monument at the Northwest corner of Section 2, the north line of which is identical with the south line of Section 34. This monument coincides with the line as found by the court.

Plaintiffs' Exhibit 26, the field notes of the original survey made in 1880 of the line between Sections 2 and 3 in Township 19, state (left side) that at 68.90 chains the surveyor intersected his previously surveyed South boundary of Township 19 at a point 8.50 chains East of the corner of Sections 33 and 34 and built a mound at that point. A chain is 66 feet and 8.50 chains is 561 feet. After locating the Southwest bearing tree and establishing the Southwest corner of Section 34 by temporary monument, Mr. Ross and Mr. Gentry checked back to see if they could find this original surveyor's mound at the Northwest corner of Section 2 and found, where it should be, a man-made mound of the approximate size described by the notes (Rep. Tr. p. 531, line 7 to p. 532, line 4; p. 550, line 15 to p. 555, line 14; p. 558, line 2 to p. 559, line 9; p. 646, line 17 to p. 650, line 12; p. 690, line 7 to p. 691, line 22). This was not an outcrop (Rep. Tr. p. 886, line 23 to p. 893, line 17) as Petitioners tried to show.

There is also the fact that the South boundary line of Section 34, as found by the court to be the true line,

ties in properly with the original surveyor's field notes of his survey of Township 19 immediately to the South in the following year (1880), and also with the official United States Government plat maps made up from the field notes of both surveys performed by the original surveyor.

The uncontradicted evidence shows that when the original surveyor surveyed the North-South lines of Township 19 the next year, on each successive Section line to the West he intersected the South line of Township 18 at a shorter distance as he proceeded Westerly with his North-South surveys (Rep. Tr. p. 790, line 19 to p. 792, line 16). This indicates a slight Southerly trend to the South line of Section 34 in accordance with the location of that corner as decided by the court rather than a sharp Northerly trend in accordance with the Hardgrove corner. The field notes (Plaintiffs' Exhibit 27, lower left) shows that going North between Sections 1 and 2, Township 19, the original surveyor measured 69.70 chains before reaching the South line of Township 18. The field notes (Plaintiffs' Exhibit 26, left side) show that going North between Sections 2 and 3 he only measured 68.90 chains before reaching the South line of Township 18 and set his mound for the Northwest corner of Section 2 at a point 8.50 chains East of the Southwest corner of Section 34. This is the mound found by Mr. Ross and Mr. Gentry by using the blazed tree found by Mr. Hardgrove as the Northwest bearing tree, and if the mound set by Mr. Hardgrove for the Northwest corner of Section 2 were correct, the original surveyor would

not have intersected the line at this point until he had measured over 8.2 chains (550 feet) farther, or a total of 77.1 chains. That the mound found by Mr. Ross is the true mound at the Northwest corner of Section 2 is further borne out by Plaintiffs' Exhibit 22 in which the distance shown from the South lines of Sections 1, 2, 3, 4, 5 and 6 are respectively as follows, reading from East to West:

North on East line of Section 1.....70.50 chains
North between Sections 1 and 2.....69.70 chains
North between Sections 2 and 3.....68.90 chains
(77.1 chains to the Hardgrove line)
North between Sections 3 and 4.....68.25 chains
North between Sections 4 and 5.....67.50 chains
North between Sections 5 and 6.....66.75 chains
North on West line of Section 6.....66.00 chains

The notes and plats are in complete conformity with the line found by the court to be the true line and are totally inconsistent with the Hardgrove line.

All this, of course, means that since the line established by the judgment of the Trial Court in this case coincides exactly with the official United States plat map of Township 18 from the notes of the 1879 survey and with the official plat map of Township 19 made from the notes of the 1880 survey (Plaintiffs' Exhibits 22 and 23), any other decision, such as the one contended for by Petitioners, would necessitate a redrawing of these plat maps to reflect the new location of the line. In short, "the sanctity of the United States Government survey" would have to be violated. It is Petitioners rather than Respondents who are collaterally attacking the original survey.

The foregoing are but a few of what the District Court of Appeal referred to as eight different factual situations supported by substantial evidence, each of which corrogorates the finding of the Trial Court (Petition, Appendix p. 57). Respondents believe, however, that they are sufficient to show the detail of evidence which the Trial Court considered in reaching its conclusion.

There is yet another reason why Petitioners' position is wholly unfounded. Following up their false premise that the Court reversed the descriptions of the two bearing trees, *which the court did not do,* Petitioners attempt to perpetrate a misconception of the law applicable to resurveys by stating that the court has no authority to settle inconsistencies in the original surveyor's field notes in the process of locating the true line as established by that original surveyor. It is well settled that it is the duty of the Trial Court to ascertain as near as might be where the monuments were set by the Government surveyors, and from records of the official survey and the evidence as to the present conditions and positions of natural objects, to locate the lines and corners of the sections and the boundary lines of the property in controversy, the points where they will best accord with the natural objects described in the field notes as being about the monuments found to exist on the ground, "and in a manner least inconsistent with the Government surveys, notes and plats." *Wilmon v. Aros,* 191 Cal. 80, 82, 214 Pac. 962; *Weaver v. Howatt,* 171 Cal. 302, 152 Pac. 925.)

The rules to be followed in this process are set forth in *Clark, Law of Surveying and Boundaries,* Second Edition, Sec. 381:

> "It may happen that there are material disagreements between some of the accessories. There may have been an error of reading or entering in the notes, the bearing, the distance or the kind of accessory. In that event, the surveyor should eliminate some of the calls in order to harmonize the greater number and thus establish the monument as originally located. In this process, the surveyor will be required to use his best judgment, and corroborate the evidence which seems the most likely."

(This work is noted favorably in *Manual of Instructions for the Survey of the Public Lands of the United States,* 1947, United States Department of the Interior, Bureau of Land Management, at p. 287-n, which is the official manual used by all licensed surveyors.)

A bearing tree is nothing more than an accessory "to evidence the position of the corner monument." (*Manual of Instructions for the Survey of the Public Lands of the United States,* 1947, United States Department of the Interior, Bureau of Land Management, Sec. 316.)

The monument best identifiable must prevail, independent of anything even in the field notes of the original survey or any subsequent survey (*Hubbard v. Dusy,* 80 Cal. 281, 22 Pac. 214). Petitioners own witness, Dupree Averill, fully corroborated these principles when he testified that the main thing to deter-

mine is what the original surveyor did, rather than what his field notes say he did (Rep. Tr. p. 475, line 3 to p. 476, line 24).

Thus, even were it true that the court, in determining the location of the line as originally surveyed, had reversed the descriptions of the bearing trees in order to conform its decision to the vast preponderance of the physical evidence, the Court would have been correctly following the law and the principles applicable to resurveys.

III.

PETITIONERS' CLAIM OF LACHES DOES NOT RAISE A FEDERAL QUESTION.

That portion of the Petition dealing with Federal questions allegedly involved in this case (Petition, pp. 12-24) does not mention the issue of laches, and we submit that laches obviously is not a Federal question. The opinion of the District Court of Appeal (Petition, Appendix, pp. 59-62) on this point shows that laches is a question of fact.

As stated in the opinion (Petition, Appendix, p. 60), Respondents first learned that mining operations were going on in the general area in August, 1954 (Rep. Tr. p. 282). Thereafter, they saw their attorney and caused a survey to be made. After this survey, by letter dated April 12, 1955, they notified Petitioners that they were operating on Respondents' property, and in June, 1955, brought this action.

(Petition, Appendix, p. 60; Rep. Tr. p. 282; Joint Exhibit 6(b), p. 417, lines 14-16; Rep. Tr. 278, line 24; Clk. Tr. p. 1). There was no evidence that Respondents knew that the mine was on Respondents' land until after the survey (Petition, Appendix, p. 61). If Guy Butler, who was a brother of the Respondent Executor, and a son of the Respondent Executrix, ever saw this mine, and there is no evidence that he did, he did not tell the Executor, Ernest W. Butler, about it. The latter testified (Joint Exhibit 6(b), p. 418, lines 17-20):

> "Q. Isn't it true, Mr. Butler, that your brother Guy had known about this mine for quite a while?
>
> "A. I couldn't say as to that. He didn't inform me of it."

Clearly, Petitioners' claim of laches is based on some theory of constructive notice. The question of constructive notice is one of fact. (*Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 440; 159 Pac. 2d 958, 974; *Sime v. Malouf*, 95 Cal. App. 2d 82, 107; 212 Pac. 2d 946, 960-961; *Schaeffer v. Berinstein*, 140 Cal. App. 2d 278, 296-297, 295 Pac. 2d 113, 125.)

Petitioners' alleged defense of laches is built on the false premise that it was the duty of Respondents, who had not seen their land between 1926 and 1955 (Petition, Appendix, p. 60; Rep. Tr. p. 286, lines 13-19), to determine whether Petitioners were mining on Respondents' land. Petitioners have never contended, and they could not, that they did not know Respondents owned the South half of the South half

of Section 34. Respondents' patent was recorded in 1919 (Plaintiffs' Exhibit 21). Petitioners had a legal duty not to trespass on that land. We know of no principle of law or equity that requires land owners to maintain a constant watch for unlawful occupants. Here the encroachment of Respondents' land was slight and the exact bondary was not known to Respondents. Respondents had the right to assume, until the contrary became apparent that Petitioners were obeying the law and not trespassing. The law of California includes the generally recognized presumption "that the law has been obeyed." (*California Code of Civil Procedure,* Sec. 1963, sub-division 33.)

The Trial Court found that Respondents acted with reasonable diligence (Clk. Tr. p. 263, Finding VIII). In none of the authorities on this issue cited in the Petition, pages 47-49, was a finding of a Trial Court on the issues of laches reversed. As was stated by the District Court of Appeal in its opinion in this case (Petition p. 62):

> "This case falls within the oft repeated rule that the weight of the evidence, the inferences to be drawn therefrom, and the credibility of witnesses are not matters for consideration by an appellate court."

CONCLUSION.

It is respectfully submitted that under no theory is there a Federal question involved in this action;

that the Trial Court decided only the factual question of the location of the survey line in issue; and that Petitioners have presented no ground upon which to base their Petition for a review by this Court.

As (we have been advised by the Clerk of this Court) was stated by the Honorable Chief Justice of this Court in denying Petitioners' Application for a Stay of the enforcement of the judgment in this case on February 13, 1957:

> "Neither the opinion nor the facts indicate that a federal question was involved or passed upon."

Dated, March 15, 1957.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 787

J. R. HOLMAN, JACK M. JAMES, LAVONNA JAMES, ANDREW J. THICKSTUN, and ALTA MAE THICKSTUN,
Petitioners,

vs.

LILLIE BUTLER and ERNEST W. BUTLER, Executrix and Executor, respectively, of the Last Will and Testament of AARON BURR BUTLER, deceased, G. M. RUSSELL, R. W. RUSSELL, and E. F. CHAMBERS,
Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

The brief of respondents in opposition to the petition for writ of certiorari follows the pattern set by respondents in the trial Court, and adhered to strictly throughout these appeal proceedings, by charging, again and repeatedly, that the claim of petitioners that the original Government survey was changed through "reversal" of the bearing trees described in the Benson field notes is false and misrepresents the trial Court record. This claim is amply

supported by record references (Rep. Tr. pp. 527, 555, and 647—See petition pp. 35 and 36), and it should be a simple matter for this Court to determine where the "falsity" lies in this cause.

Respondents seemingly have adopted the precept espoused by a certain modern school of thought which holds that, if a false premise is enunciated often enough, it will ultimately be believed. Unfortunately, thus far, the Courts considering the issues in this cause have fallen victim to this strategy in ruling, in effect, that reversal of the two bearing trees described in the Benson field notes does not constitute such a change in an official United States Government survey as is barred by law. This is the principal issue in this cause, and it is rendered difficult to determine by the great mass of confusing matter not related thereto injected into the record, and even in the briefs filed in this cause, by respondents. It is hoped that this Honorable Court will not be similarly bemused in its consideration of this cause.

Respondents Reject Own Experts

Petitioners have heretofore cited at length in their petition the unanimous testimony of all surveyor witnesses who testified in this cause, including respondents' surveyor witnesses, Ross and Gentry, that the 24-inch scribed forked bearing tree discovered by surveyor witness Hardgrove was the Southwest bearing tree described in the official Benson field notes. Obviously, respondents cannot prevail unless they reject this evidence of their own experts, since it would dictate locating the section corner in question in accordance with said field notes and *Northeast* of said scribed bearing tree, not *Southeast,* as respondents would have it, in order to have the South line of the section run south of the mine, thus laying the basis for a large

judgment. The net effect of the reversal of the field notes, as heretofore noted, was to move the Southwest corner of Section 34 a distance of 543.65 feet South of its true location, as established by the United States Government survey.

Thus, to contradict or "impeach" the testimony of their own experts, respondents rely on the testimony of witness Emmert to "clear up" the sworn testimony of surveyor witnesses Ross and Gentry (page 14, their brief in opposition to certiorari). Respondents do not deny that Ross and Gentry testified exactly as they have been quoted, verbatim, by petitioners, but it is intimated that Ross and Gentry, surveyors with many years of experience in identifying bearing trees and other monuments, received such an "education" from the testimony of Emmert, a non-surveyor, that their testimony should be disregarded. Ross and Gentry have never changed their original testimony, and it stands unchanged in the record as given.

As a matter of fact, witness Emmert never positively stated that the pieces of burnt wood, located by witness Ross Southwest of the section corner created through reversal of the Benson field notes, came from a tree "20 to 24 inches in diameter at breast height", as is inferred on page 14 of respondents' brief. Emmert was most uncertain as to the actual size of the tree.

As to the piece of burnt wood taken from this purported bearing tree (Plaintiffs' Exhibit 28), Emmert testified under examination by counsel for respondents (Rep. Tr. p. 837):

> "Yes. Well it is approximately nine inches in diameter, what remains. I would say it certainly was somewhat bigger than that. Perhaps only a few inches.

"Q. About how much bigger? Could you estimate that?

"A. That is pretty hard. *I could only guess.*" (Emphasis added.)

As to what portion of the tree said piece of burnt wood was from, Emmert testified (Rep. Tr. p. 838):

"A. Well, I have no opinion as to how high or how low up the tree that would have come from, just from looking at it.

"Q. Is it possible to make such a determination so far as from your knowledge and experience you know?

"A. *I don't think so.*" (Emphasis added.)

In connection with the same purported bearing tree, counsel for respondents further interrogated witness Emmert (Rep. Tr. p. 839):

"Q. Which would make the tree at breast height approximately twenty inches, in your opinion, in diameter?

"A. That would be assuming that this were a tree with a single bowl and had something like normal taper. *Perhaps* the tree was forked and then the stump of the tree might be almost any diameter, though it could not be larger of course than the hole in the ground. But if it were forked down low why it might be very difficult even if you could see the tree to say what size it is. *It is pretty hard to measure a forked tree under any circumstances.*

"Q. From your observation of the root system of that tree and what you found there, do you have an opinion as to the diameter of the tree at breast height?

"A. Well, the measurement I made was 31 inches one way across the root socket. Now the tree would taper from that root socket, it would taper quite a

bit to ordinary stump height. It would *probably* taper a few inches more to breast height. *So it is pretty hard to estimate how big it was.* It certainly was less than 30 inches. *Perhaps* in the neighborhood of 20 to 24 inches. *It is pretty hard to estimate.*" (Emphasis added.)

Obviously the much-heralded Emmert testimony, intended by respondents to "cancel out" and wholly negate the positive testimony of their own expert surveyors as to the positive identification of the true Southwest bearing tree to Section 34, as set forth in the Benson field notes, is based purely upon supposition, guess and conjecture.

Contradictory Evidence Proves Nothing

Respondents cannot deny that the burden of proof was upon them at the trial of this cause, and that any judgment rendered as a result of such trial must be based upon *consistent* and *unconflicting* evidence adduced by them thereat bearing upon the issues. As hereinabove noted, respondents rely upon the testimony of witness Emmert to cancel out, negate, contradict and impeach the sworn testimony of their own surveyor experts, Ross and Gentry. In effect, the Court is asked to ignore the circumstances testified to by Ross and Gentry, and accept the testimony which it is claimed was given by Emmert.

That a party with the burden of proof who introduces evidence consistent with two states of fact actually proves neither is so fundamental as hardly to require citation of any authority. However, the case of *Grand Trunk Western Ry. Co.* v. *Holstein,* 67 F. 2d 780, is of interest in this connection. That case was a jury case, but the law set forth therein would apply with equal force to the case at bar.

The opinion contains the following at page 782:

> "If the plaintiff presents evidence of and relies upon one set of circumstances, and the defendant presents evidence of and relies upon another, there is clearly a conflict of evidence to be submitted to the jury. But if the evidence of both sets of circumstances is offered by the plaintiff, then we have in substance a situation identical with the one where several inferences may logically be drawn from the same set of circumstances. Under these conditions the jury should not be permitted to guess or speculate which set of circumstances it will accept. This principle has been well expressed by Mr. Chief Justice Taft, when Circuit Judge, in the following sentence: *'When a party with the burden on him introduces evidence consistent with two different states of fact, he proves neither.' Louisville & Nashville R. Co.* v. *East Tennessee, V. & G. R. Co.*, 60 F. 993, 999 (C. C. A. 6). Compare, also, *Ewing* v. *Goode*, 78 F. 442, 444 (C. C.); *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562; *Stevens* v. *The White City*, 285 U. S. 195, 203, 204, 52 S. Ct. 347, 76 L. Ed. 699." (Emphasis added.)

Respondents have proved nothing in the case at bar through contradiction and "impeachment" of their own experts, and having thus failed, they have no standing in this Court to assert the propriety of the unjust judgment entered in this cause, which petitioners pray, through the granting of certiorari herein, may ultimately be rendered for naught.

Federal Question Involved

Petitioners respectfully reiterate that a Federal question is involved in this cause and that they are entitled to have this Court protect them against an erroneous judgment based entirely upon a violation of the law, as laid down in its decisions. (See petition, pp. 25 to 31, inclusive.)

Wide Jurisdiction of This Court

Respondents take refuge in the assertion that the trial Court determined the issues of fact in this cause and that such determination cannot be inquired into by this Court through a writ of certiorari. But they overlook the fact that this Court has such wide discretion that it may properly search out anything in the record, if necessary, to see that justice between the parties is attained.

In this connection, the following from the opinion in *United States* v. *Ansonia Brass and Copper Company*, 218 U.S. 452, is of interest (Page 462):

> "We think that from this statement of the claims made in the court below on behalf of the United States assertions were made of rights and immunities which were the creation of Federal authority, and the denial thereof by the judgment of the state court brings the case within the provisions of §709 of the Revised Statutes of the United States. It is not necessary to lay the foundation for jurisdiction that the claims of Federal rights asserted should be well founded; it is enough if they are substantial claims of Federal rights within the statute, and such as were duly asserted and directly or necessarily denied in the judgment and decision of the state court."

In the case of *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U.S. 737, involving a suit in a State Court in which a fraternal order of white

members only sought an injunction against a similar order of Negro members only, to restrain the latter from further use of a name, constitution, etc., like those adopted earlier and in use by the former, the Court stated the following (Page 744):

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Creswill* v. *Knights of Pythias,* 225 U.S. 246, 258, 261; *Ward* v. *Love County,* 253 U.S. 17, 22; *Davis* v. *Wechsler,* 263 U.S. 22, 24; *Railroad Commission* v. *Eastern Texas R.R. Co.,* 264 U.S. 79, 86; *New York Central R.R. Co.* v. *New York & Pennsylvania Company,* 271 U.S. 124, 126."

The opinion in the case of *Pierre* v. *Louisiana,* 306 U.S. 354, by Mr. Justice Black, contains the following, at page 358:

> "But the State insists, and the Louisiana Supreme Court held (the Chief Justice dissenting), that this evidence failed to establish that members of the negro race were excluded from the Grand Jury venire on account of race, and that the trial court's finding of discrimination was erroneous. Our decision and judgment must therefore turn upon these disputed questions of fact. In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal

protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

The opinion by Mr. Justice Douglas in *United States* v. *Pink*, 315 U.S. 203, contains the following, at page 217:

> "This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 462-463, 471; *Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 744-745; *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540; *Pierre* v. *Louisiana*, 306 U.S. 354, 358."

The following from the opinion of the late Chief Justice Stone in *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 173, is also of interest as defining the scope of this Court's jurisdiction (Page 176):

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awotin* v. *Atlas Exchange Bank*, 295 U.S. 209; *Deitrick* v. *Greaney*, 309 U.S. 190, 200-01."

And also the following from Mr. Justice Black's opinion in *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U.S. 239, at page 245:

> "If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would

actually deny, federal rights which Congress, by providing alterenative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under § 237 (b) of the Judicial Code, 28 U.S.C. § 344 (b)."

The Benson Field Notes Govern Line

Contrary to what is stated in respondents' brief, garnished with record references purportedly in support thereof, as to topographical or other features which allegedly support the erroneous line adopted by the trial Court, it is a fact that petitioners followed the official Benson field notes to the letter, while respondents, on the other hand, rejected those portions that could not be made to fit their new section line.

As previously noted in the petition, at page 557 of the Reporter's Transcript, witness Ross testified that "there are numerous errors in those notes" (that is, Benson's field notes), "the calls do not fit in many cases," referring to the line erroneously established by the trial Court, just a short distance south of the line Ross first established.

The testimony of surveyor Hardgrove and cadastral engineer Dupree R. Averill demonstrates conclusively that the Hardgrove line rejected by the trial Court coincides remarkably with the line established by the Benson field notes. This appears concisely in the Reporter's Transcript at page 1001, *et seq.*

It is not surprising that witnesses Ross and Gentry, in running a line commencing 543.65 feet South of the true location of the Section corner, experienced difficulty in making the calls of Benson's field notes fit the terrain over which they traveled.

Bearing Tree a Monument

As noted in the petition, monuments prevail over courses, distances, and other methods of following the footsteps of the original surveyor, and, once such monument has been located, the surveyor must ascertain the true boundary with reference to it. A bearing tree is, of course, a monument. In this connection, *Black's Law Dictionary,* Fourth Edition, contains the following at page 1159:

> "In real-property law and surveying, monuments are visible marks or indications left on natural or other objects indicating the lines and boundaries of a survey. In this sense the term includes not only posts, pillars, stone markers, cairns, and the like, but also fixed natural objects, *blazed trees,* and even a watercourse." (Citing authorities) (Emphasis added.)

Thus, the scribed, forked, 24-inch bearing tree discovered by witness Hardgrove, which all surveyor witnesses testified was the Southwest bearing tree to Section 34 described in the official United States Government field notes, was a "monument" positively locating said section corner

Northeast thereof. Despite all the specious argument of respondents' counsel, vehement protests that "nothing was changed" (see pages 2, 6, and 8 of respondents' brief in opposition) and "agreement" with the principles of law cited by petitioners (see pages 2, 7, and 10 of respondents' brief), the fact remains that the section corner relied upon by respondents was established by conversion of that bearing tree into the *Northwest* bearing tree, *reversing* the official field notes, thus moving the section corner 543.85 feet south of its true location.

Petitioners repeat and reiterate that the section corner in question *must*, under the decisions of this Court, be established as described in the official field notes, and once so established, a straight line running from that section corner East to the Southeast corner of Section 34 (the location of which is not in dispute) establishes the South boundary of that Section and the South line of the Butler property. *It is undisputed in this cause that a line so established would run North of the mine, eliminating any basis whatsoever for damages against petitioners.*

Conclusion

Respondents, understandably, take great comfort in a statement attributed to Mr. Chief Justice Warren, quoted on page 27 of their brief in opposition to writ of certiorari. On the date noted, the record in this cause had not yet been forwarded to this Court and was, of course, not available for examination by Mr. Chief Justice Warren. Petitioners respectfully submit that such an examination would be a necessity to justify the statement and that such an examination would support petitioners' contention that a Federal question is involved in this cause.

Petitioners pray that a writ of certiorari to the District Court of Appeals of the State of California for the Fourth District be granted by this Honorable Court, to the end that the erroneous judgments of the lower Courts may be reviewed, reversed, set aside, and rendered for naught, thus, at long last, according to petitioners that justice which is long overdue.

Dated March 29, 1957.

Respectfully submitted,

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